

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MICHAEL MARTEL, WARDEN, :

4 Petitioner :

5 v. : No. 10-1265

6 KENNETH CLAIR :

7 - - - - - x

8 Washington, D.C.

9 Tuesday, December 6, 2011

10

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:03 a.m.

14 APPEARANCES:

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16 General, Sacramento, California; on behalf of
17 Petitioner.

18 SETH P. WAXMAN, ESQ., Washington, D.C.; on behalf of
19 Respondent.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	WARD A. CAMPBELL, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	SETH P. WAXMAN, ESQ.	
7	On behalf of the Respondent	27
8	REBUTTAL ARGUMENT OF	
9	WARD A. CAMPBELL, ESQ.	
10	On behalf of the Petitioner	52
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 10-1265, Martel v. Clair.

5 Mr. Campbell.

6 ORAL ARGUMENT OF WARD A. CAMPBELL

7 ON BEHALF OF THE PETITIONER

8 MR. CAMPBELL: Mr. Chief Justice, and may it
9 please the Court:

10 For 12 years, Mr. Clair's Federal habeas
11 corpus petition was litigated in the Federal district
12 court in front of the same Federal district court judge.
13 His petition raised 39 challenges to his guilt and
14 penalty, and the judge oversaw years of discovery,
15 presided over a 2-day evidentiary hearing, and received
16 extensive briefing.

17 When the case was under submission,
18 Mr. Clair sent a letter to the judge expressing
19 dissatisfaction with his team of attorneys from the
20 Federal Public Defender's office, and requested that
21 they be replaced. The judge asked both sides' counsel
22 for their position on Clair's complaint. The Federal
23 Public Defender responded that, after conferring with
24 their client, Mr. Clair was willing to continue with
25 them for that point.

1 The court then stated it would take no
2 further action. 3 months later, just before the court
3 was to issue its decision in the case, Clair complained
4 again. The court issued a written order --

5 CHIEF JUSTICE ROBERTS: Was there some way
6 that Clair knew that the court was just about to issue
7 its decision?

8 MR. CAMPBELL: I think, Your Honor, the only
9 way to be sure was the fact that at some point, as I
10 understand it, the district court judge had announced
11 the day he would be retiring, which would be June 30th
12 of 2005. So, there's probably an inference there that
13 it could be expected that the decision was going to be
14 coming out by the end of the -- end of June 2005.

15 JUSTICE GINSBURG: There was a deadline set
16 for all submissions, wasn't there?

17 MR. CAMPBELL: There was an initial deadline
18 set for the filing of the briefing, post-evidentiary
19 hearing briefing, and there would be no extensions of
20 time.

21 Subsequently, there was in fact another
22 submission by Mr. Clair in May of 2005 with some
23 additional declarations. The court accepted those
24 declarations, but made it clear it would accept no
25 additional submissions in the case unless it ordered

1 otherwise, that it would proceed with the decision.

2 Once upon -- anyway, in June, June 16th,
3 2005, Mr. Clair sent a second complaint about his
4 counsel again, and the district court issued a written
5 order denying that request, finding that Clair's counsel
6 was doing a proper job and did not appear to have a
7 conflict of interest.

8 The district court had an excellent factual
9 basis for that conclusion because it had just concluded
10 work on its extensive order denying the petition in Mr.
11 Clair's case.

12 JUSTICE GINSBURG: But this petition had
13 something new, the report that his investigator had
14 turned up this evidence.

15 MR. CAMPBELL: That's correct, Your Honor.
16 The -- what Mr. Clair's complaint indicated, there was
17 some additional physical evidence that had not been
18 examined or investigated before. He indicated that the
19 Federal Public Defender actually had met with the Orange
20 County law enforcement about the evidence, and he was
21 upset that there was no further action being taken by
22 the Federal Public Defender regarding testing, seeking
23 DNA testing or testing of that evidence.

24 JUSTICE ALITO: There has been some
25 additional litigation regarding this physical evidence

1 since this -- the time of -- of the unsuccessful
2 substitution request, hasn't there been?

3 MR. CAMPBELL: That's correct.

4 JUSTICE ALITO: Could you tell us what has
5 happened with that?

6 MR. CAMPBELL: I'm sorry?

7 JUSTICE ALITO: I'm sorry. Could you tell
8 us what has happened with that litigation?

9 MR. CAMPBELL: The status of that
10 litigation: Once the -- the petition was denied,
11 Mr. Clair filed a notice -- there was a notice of appeal
12 filed by the Federal Public Defender. Mr. Clair also
13 filed a notice of appeal because of the denial of his
14 substitution motion. Those were merged together.
15 Mr. Clair was appointed new counsel.

16 The new counsel then filed a rule -- a
17 rule -- a request to the district court to entertain a
18 Rule 60(b) motion, which the district court denied. The
19 Ninth Circuit ordered that the district court consider
20 the Rule 60(b) motion. The district court heard the
21 Rule 60(b) motion and then denied it.

22 Mr. Clair then filed a protective petition,
23 a petition for writ of habeas corpus for a successive
24 petition, with the Ninth Circuit, and has also filed a
25 petition for writ of habeas corpus with the California

1 Supreme Court.

2 JUSTICE ALITO: That's what I was referring
3 to.

4 MR. CAMPBELL: Yes.

5 JUSTICE ALITO: And what -- what has
6 happened there? Was there -- was there testing of this
7 evidence in connection with that?

8 MR. CAMPBELL: There -- there had been --
9 there has been some testing of the evidence during --
10 during that time by the Orange County law enforcement in
11 regards to its relationship to the crime, or its
12 relationship to another crime that occurred at that
13 time, which I think that information is set forth in the
14 appendix to the opposition to the petition for
15 certiorari.

16 The --

17 JUSTICE SOTOMAYOR: I'm sorry. Can you
18 remind me of what the outcome of that testing was?

19 MR. CAMPBELL: The -- the outcome of -- of
20 the testing is that, to the extent that the testing was
21 done to see if the -- there was any DNA matching between
22 the other murder that had occurred a couple days before
23 and the murder of Ms. Rodgers -- let's see if I can say
24 this succinctly. The -- there was -- there was no
25 matching of Mr. Clair's DNA with anything from the

1 murder scene of the Rodgers murder, and there was no
2 matching of any DNA that was found for the perpetrator
3 of the other murder at the site of Ms. Rodgers' murder.

4 JUSTICE SOTOMAYOR: Counsel, as I read your
5 briefs, I think you're making, perhaps, two different
6 arguments. And I want to focus you in on which one you
7 are really concentrating on.

8 MR. CAMPBELL: Okay.

9 JUSTICE SOTOMAYOR: Which is, this
10 presentation seems to be that, regardless of what
11 standard we apply to the court of appeals review of what
12 the district court did in denying the motion to
13 substitute counsel, that it was wrong. And I presume
14 that means it was wrong for the standard you are
15 proposing and it was wrong for the interest of justice
16 standard, am I correct?

17 MR. CAMPBELL: I -- yes, Your Honor. I
18 think under any standard that would apply, we think that
19 the -- that the Ninth Circuit's disposition is
20 incorrect.

21 JUSTICE SOTOMAYOR: All right. As I read
22 the Ninth Circuit's decision, assuming an interest of
23 justice standard because that's the one they invoked,
24 they said what happened here is that the district court
25 didn't hold a hearing to determine itself exactly what

1 the dispute was about, and so it was a process failure,
2 basically is what they're saying.

3 Now, you make assumptions based on matters
4 that have come up since that hearing about what the
5 dispute was about and -- but I still don't know what the
6 Federal defender's position was as to whether or not
7 communications had broken down with the client to a
8 point where they thought, as they did on appeal, that
9 they couldn't continue.

10 So, tell me why, assuming we accept that an
11 interest of justice standard applies, the circuit court
12 has no power or applied it improperly by saying --
13 forget about the remedy -- has no power to say, district
14 court judges, you have to at a minimum inquire and set
15 forth your reasons based on the facts of that inquiry.

16 MR. CAMPBELL: Yes. And the reason is that,
17 looking at the record and what was presented to the
18 Federal district court at the time it received the
19 request by Mr. Clair in June of 2005, what Mr. Clair's
20 allegation was was that he disagreed with the
21 investigative, tactical, strategic decisions that were
22 being made by the Federal Public Defender. That -- that
23 was the reason that was in Mr. Clair's -- Mr. Clair's
24 allegation. Those premises, even --

25 JUSTICE SOTOMAYOR: But what does that have

1 to do with "I think they are doing a good? I mean, it
2 -- it could well be that the judge later decides, after
3 he hears from the Federal defender, I don't think
4 that -- we don't think there is anything to be done, he
5 disagrees. But he really never got an explanation from
6 the Federal defenders.

7 MR. CAMPBELL: I'm sorry --

8 JUSTICE SOTOMAYOR: He never got an
9 explanation from the Federal defenders.

10 MR. CAMPBELL: Your Honor, it in fact -- it
11 would be -- it's appropriate -- if the record -- if the
12 allegations of the -- of the Petitioner and the record
13 before the court is sufficient for the court to make the
14 finding that there is in fact no basis for substitution,
15 it is not necessary for the court to go ahead and
16 conduct an inquiry or a hearing or to initiate other
17 further process in the case; and the allegation here
18 which went to the physical evidence in the case from the
19 standpoint of the evidence in this case, and the way
20 this case is prosecuted, and the evidence of Mr. Clair's
21 guilt, the fact that there was additional physical
22 evidence that might be available, simply wouldn't have
23 supported any cognizable claims in the Federal habeas
24 corpus action.

25 There was no need for any further

1 investigation or inquiry on the part of the court based
2 on what was presented to it at the time.

3 JUSTICE ALITO: What about a -- a possible
4 Brady claim? Is there a disagreement about whether this
5 physical evidence could have been tested at the -- and
6 revealed anything at the time of the trial?

7 MR. CAMPBELL: There I have to -- I think I
8 have to take what the Ninth Circuit says in its opinion
9 about this case, which is what we have here is physical
10 evidence that could be subject to forensic testing now
11 that was not available in 1987. So the fact that there
12 might be later -- there might have been developments in
13 forensic techniques since 1987 when Mr. Clair's trial
14 occurred, doesn't support any claim of trial error back
15 in 1987. You can't show any prejudice from any -- from
16 any failure back in 1987 because the testing wasn't
17 available to do that they now want to do.

18 JUSTICE ALITO: What about an actual
19 innocence claim?

20 MR. CAMPBELL: Well, an actual innocence
21 claim, I think to begin with, it wouldn't be clear,
22 based on this Court's jurisprudence at the time, that a
23 factual innocence claim would be cognizable in this
24 Federal habeas corpus proceeding. It would be a -- this
25 Court has indicated to the -- has never really actually

1 held that that is a cognizable claim. Even if it -- it
2 did, it wouldn't be an exhausted, it would certainly be
3 an unexhausted claim. California in fact does entertain
4 that type of claim, does provide a State avenue for that
5 type of claim.

6 There is plenty of reasons why you would not
7 raise that claim at this point, especially at the end of
8 the process of the first Federal habeas corpus petition.

9 JUSTICE SOTOMAYOR: You are familiar with
10 3599(e), aren't you?

11 MR. CAMPBELL: Yes.

12 JUSTICE SOTOMAYOR: Which requires counsel
13 to participate in subsequent proceedings.

14 MR. CAMPBELL: Yes.

15 JUSTICE SOTOMAYOR: Of a certain type and
16 limited.

17 Is it your position that if there is a
18 complete breakdown of communications with an attorney,
19 post habeas decision, that that is inadequate in the
20 interest of justice or otherwise for a court to say,
21 that could implicate proceedings after 3599, so I should
22 substitute now?

23 MR. CAMPBELL: Actually, Your Honor, yes, it
24 is. At that point the defendant has, of course, already
25 gone through the trial, the State appeal, and the State

1 habeas process, as -- particularly at the State trial
 2 and the State appellate process, of course, the standard
 3 for substitution of counsel is the potential total
 4 breakdown of communications, the irreconcilable
 5 conflict, conflict of interest. By the time you've gone
 6 through the entire process by which you have gone
 7 through the State trial, you have exhausted your claims
 8 in State court --

9 JUSTICE SOTOMAYOR: Oh, but you are
 10 presuming you are going to win.

11 MR. CAMPBELL: Excuse me?

12 JUSTICE SOTOMAYOR: You are presuming you
 13 are going to win. I think 3599 applies to situations in
 14 which the habeas petitioner wins a remand or otherwise
 15 has something that's going to follow the habeas
 16 decision.

17 MR. CAMPBELL: Well, Your Honor, the -- the
 18 point is is that by the time you have reached that
 19 juncture, in which the claims have been raised and
 20 litigated multiple times in multiple forums, that the
 21 need for the type of communication and contact that
 22 occurs at the trial and State appellate level is not as
 23 essential or necessary at that juncture.

24 JUSTICE GINSBURG: Suppose -- suppose the
 25 public defender had said to the district court what it

1 said to the Ninth Circuit, and that is that the
2 attorney-client relationship has broken down to such an
3 extent that substitution would be appropriate, which
4 wasn't asked. But suppose the public defender had given
5 that answer to the district judge. Would the district
6 judge still have rightly denied the motion for
7 substitution?

8 MR. CAMPBELL: Yes, he would have,
9 especially given that the case at that point was
10 completely under submission and simply awaiting for
11 decision. At that point there is in fact no more
12 litigation to be occurring, the -- whatever the problem
13 with communication is at that point is not going to in
14 any way adversely affect the -- the representation. The
15 case is over.

16 JUSTICE KAGAN: If I understand your answers
17 to some of these questions, you are not at all relying
18 on the fact that the district court had made this
19 decision 2 months earlier. You think that the answer
20 would be the same had the district court not made an
21 inquiry 2 months earlier; is that correct?

22 MR. CAMPBELL: That -- that is correct. I
23 mean, if -- yes. That -- that is an extra fact in this
24 case, but I don't think that's the pivotal fact as far
25 as what the district court has done as far as exercising

1 its direction -- its discretion in June when it received
2 the complaint from Mr. -- Mr. Clair.

3 JUSTICE KAGAN: So when is a district court
4 required to engage in some kind of inquiry?

5 MR. CAMPBELL: Well, when the -- when the
6 allegation is made that -- by the petitioner that he
7 has, in fact, been denied what he is entitled to under
8 3599, which is the appointment and representation by
9 counsel qualified under that statute.

10 JUSTICE KAGAN: Well, I -- I was, again
11 assuming as Justice Sotomayor was, that if we're in an
12 interest of justice world, if that's the appropriate
13 standard, when is the district -- when does the district
14 court have to make an inquiry, and what kind of inquiry
15 does he have to make?

16 MR. CAMPBELL: The -- the inquiry -- the
17 inquiry would occur when an allegation was made that,
18 for whatever reason, the counsel does not meet the
19 qualifications that are expected to be met, the counsel
20 has a adverse conflict of interest, or counsel has
21 basically reached a point where he is no longer
22 representing or acting as an advocate for --

23 JUSTICE KAGAN: Well, you're -- I thought
24 that that test was an alternative to the interest of
25 justice standard. I am positing that the interest of

1 justice standard applies and you are giving me back
2 those same three factors. Do you think that that is all
3 the interest of justice standard is about?

4 MR. CAMPBELL: I think in the context of the
5 Federal habeas corpus action, that is in fact -- in
6 which there is a statutory right to counsel -- that is
7 in fact the interest -- where the interest of justice
8 standard would be. The interest of --

9 JUSTICE SOTOMAYOR: So this is sort of a
10 made-up standard.

11 MR. CAMPBELL: No --

12 JUSTICE SOTOMAYOR: Can you point to one
13 case in which this standard has been used by any
14 district court or court of appeals?

15 MR. CAMPBELL: No, I cannot.

16 JUSTICE SOTOMAYOR: Can you point to any
17 inquiry by Congress in which such a test was discussed,
18 considered in any way?

19 MR. CAMPBELL: No, I cannot.

20 JUSTICE GINSBURG: Where did you get it
21 from?

22 MR. CAMPBELL: It's actually analogous to
23 the way this Court over the years has divided up the
24 jurisprudence regarding the Sixth Amendment right to
25 counsel and the dividing line between claims of

1 ineffective assistance of counsel and claims of denial
2 of counsel.

3 JUSTICE SOTOMAYOR: Well, so what you're
4 suggesting is in noncapital cases, which are less
5 serious, you are going to have a higher bar for a right
6 that the statute gives a judge without any limitation.
7 The capital limitation is that the judge on its own
8 motion or a motion by defendant can substitute.

9 MR. CAMPBELL: No, we're not in the context
10 of a noncapital habeas. There has never been any
11 construction, certainly by this Court, of what "interest
12 of justice" means in the context of substitution of
13 counsel, of a statutory counsel, in the context of
14 either capital or noncapital habeas.

15 JUSTICE SOTOMAYOR: So how about a standard
16 that the courts are used to and one that has a basis in
17 Congress's choice, like interest of justice?

18 MR. CAMPBELL: Well, actually, Your Honor, I
19 think we have in fact, to the extent we are analogizing
20 to what this Court has long done as far as dividing
21 question of Sixth Amendment claims between ineffective
22 assistance of counsel and denial of counsel. We are in
23 fact submitting a concept that is actually very familiar
24 to this Court and very similar to what this Court deals
25 with in many Sixth Amendment claims.

1 We are simply looking at it in the context
2 now of the fact that you have been given or entitled, a
3 statutory entitlement to be represented by counsel, you
4 are entitled to protect that right to the extent to
5 vindicate that particular right, which is to be
6 appointed that counsel. If you are denied that right,
7 then you in fact have a legitimate reason to ask for new
8 counsel, for new counsel to be appointed. The interest
9 of justice standard doesn't have a fixed meaning,
10 really, in any context.

11 JUSTICE BREYER: It doesn't have a fixed
12 meaning. I mean wouldn't you think -- I suspect the
13 answer is you do think -- that -- a district judge has a
14 lot of power in many, many areas and in one of those
15 areas some district judge sometimes could make a
16 horrendous mistake that really wrecks a case, and in
17 such a matter the court of appeals if it sees a really
18 horrendous error will probably have the authority to say
19 you went beyond whatever standard applies, at least
20 here, at least -- okay, we agree on that one.

21 So they use some words, "effectiveness" and
22 whatever the words are, "interest of justice," just to
23 reflect that fact. I mean, that's what I think what
24 happens. And your complaint is he didn't abuse his --
25 he didn't really abuse anything, he made a good

1 decision, the district judge. Isn't that what that
2 comes down to?

3 MR. CAMPBELL: That is certainly an aspect
4 of the complaint. But to us what's very important --

5 JUSTICE BREYER: What's important?

6 MR. CAMPBELL: What is important here is
7 that the premise of the Ninth Circuit's opinion is that
8 it would be an acceptable motion for substitution for
9 the -- for Mr. Clair to complain or allege disagreements
10 with his counsel about --

11 JUSTICE BREYER: All right, so what's
12 bothering you is the way they applied it.

13 MR. CAMPBELL: Well --

14 JUSTICE BREYER: And they applied it in
15 circumstances that you think -- the district judge
16 actually, his decision was fine. You don't have the
17 power to set that aside because it was within -- it's
18 within the scope of any kind of standard you want to
19 call it, including calling it "interest of justice." Am
20 I right in thinking that, that that's really your
21 concern?

22 MR. CAMPBELL: Yes, our concern, Your Honor,
23 is that the premise of the Ninth Circuit's opinion is --
24 goes to what the appropriate standard, what the
25 appropriate level of complaint, whatever you want to

1 call it --

2 JUSTICE BREYER: So what you really want us
3 to do is to look at the record of the case, go through
4 it, and say, here, whatever words you want to use, the
5 district court acted in his discretion in saying don't
6 change the counsel? Is that what I'm supposed to do?
7 I'm trying to get at what you want me to do.

8 MR. CAMPBELL: Yes, that is -- yes.

9 JUSTICE SCALIA: Well, no, you don't want
10 that. You don't want to stay whatever words you used.

11 JUSTICE BREYER: No --

12 JUSTICE SCALIA: You want us to say the
13 words to be used are the words that we use in deciding
14 whether you have been accorded your constitutional right
15 to counsel, right?

16 MR. CAMPBELL: That's -- that's correct,
17 Your Honor. I think the confusion here --

18 JUSTICE BREYER: I didn't mean literally
19 "whatever words you use." I'm trying to figure out what
20 you want me to do. One is to go back and search all the
21 cases that use some words for a standard, which, as you
22 can tell, I'm reluctant to think that that is meaningful
23 in this case.

24 The other is to look at the record to see if
25 he acted within what you would normally think of as the

1 district court's discretionary authority.

2 MR. CAMPBELL: I think the confusion here is
3 caused by the fact that the Ninth Circuit opinion
4 started out by borrowing the phrase "interest of
5 justice" and inserting it into a section where -- where
6 it was not inserted, and it would appear to be a
7 deliberate act of Congress to do that, and then it gave
8 it a meaning which we think under any circumstances
9 would be inappropriate in this context.

10 CHIEF JUSTICE ROBERTS: I suppose you don't
11 think that the standard of review is abuse of
12 discretion, because if you do then I suppose you are
13 assuming that the district court has discretion whether
14 to grant the motion or not instead of being confined by
15 a particular standard.

16 MR. CAMPBELL: Well, abuse of discretion --
17 if the Court is wrong as a matter of law, of course, it
18 automatically -- I mean, that is an abuse of discretion.

19 And our feeling here about the Ninth
20 Circuit's opinion is that the way it has defined what
21 would be appropriate in terms of a motion for a
22 substitution and what would trigger an inquiry by the
23 judge, as a matter of law the Ninth Circuit was wrong in
24 this case.

25 JUSTICE KENNEDY: Well, but abuse of

1 discretion doesn't mean that the judge operates in a
2 vacuum. If we make -- issue an opinion and say, oh,
3 well, the standard is an abuse of discretion, that
4 doesn't tell people too much. Abuse of discretion based
5 on what standards, what inquiries? And that's -- I
6 would like to know what your position is on that,
7 because it seems to me that at the end of the day it's
8 going to be something very close to interest of justice.

9 MR. CAMPBELL: Well, Your Honor, the
10 substance -- if we want to call it an interest of
11 justice standard, the substance of it would be that it
12 would not be -- substitution would not be -- it would
13 not be appropriate to move for substitution on the basis
14 of disagreements with counsel about tactical or
15 investigative decisions, such as Mr. Clair did here.
16 The appropriate standard is whether or not there has
17 been an actual denial of counsel as provided under
18 section 3599.

19 JUSTICE SOTOMAYOR: Counsel, could I give
20 you an example? Beginning of the litigation, all right?
21 Capital counsel is appointed. Capital counsel wants to
22 raise challenges to the conviction and sentence, and
23 defendant says: I don't -- I want to die. Is the
24 district court entitled to substitute that counsel under
25 your theory? Because you said to me it has to be

1 counsel that's -- that counsel that has abandoned the
2 client. Counsel doesn't want to abandon the client,
3 counsel wants to prosecute the case. There is no
4 conflict of interest. Counsel's not representing
5 anybody else. And what was your third criteria?

6 MR. CAMPBELL: Qualifications, just the
7 basic --

8 JUSTICE SOTOMAYOR: Well, this is Seth
9 Waxman, sitting right next to you.

10 MR. CAMPBELL: He's undoubtedly qualified,
11 Your Honor.

12 JUSTICE SOTOMAYOR: I suspect that's the
13 case.

14 MR. CAMPBELL: Otherwise he wouldn't have
15 the appointment.

16 JUSTICE SOTOMAYOR: So beginning of the
17 case, first decision, and defendant comes in and says:
18 Substitute my attorney. What would be your argument
19 under your test?

20 MR. CAMPBELL: There are several responses
21 to that. At one level the client would always -- always
22 has and I think always has basic decisionmaking
23 authority over basic decisions, whether or not a
24 petition should be filed or not filed, this type of
25 thing. So a failure of an attorney to abide by that

1 particular instruction would in fact be a failure --

2 JUSTICE SOTOMAYOR: So there are some
3 decisions that the client controls?

4 MR. CAMPBELL: There have always been some
5 basic decisions the client makes in any, in any case.
6 But it's not --

7 JUSTICE SOTOMAYOR: But that's not
8 abandonment. That's an error. That's a problem. But
9 it's not abandonment under your definition.

10 MR. CAMPBELL: It is in fact the failure of
11 the lawyer to truly act as an agent for the client at
12 that point.

13 JUSTICE SOTOMAYOR: Well, if I tell my
14 attorney, follow these leads, that's a failure of an
15 agent as well.

16 MR. CAMPBELL: It's actually, though -- that
17 is in fact normally always considered to be an area
18 that's within the domain of the attorney. Those types
19 of investigative tactical decisions have always been
20 decisions that attorneys have normally made for their
21 clients and not necessarily under the control of their
22 clients.

23 But let me tell you about the volunteer
24 situation, as a practical matter. The volunteer
25 situation is a whole -- almost a whole separate category

1 of litigation from the kind of litigation we are talking
2 about. What normally happens in those cases is counsel
3 is not substituted; usually frequently a second counsel
4 is brought in to deal with representing the client on
5 those particular issues, and the first counsel remains.
6 So that's become --

7 JUSTICE SCALIA: Volunteer issue? What are
8 you talking about? I'm --

9 MR. CAMPBELL: A volunteer issue is when
10 someone says: I do not want to pursue my remedies, I
11 want to simply be executed. In the practice we call
12 that a volunteer.

13 JUSTICE SCALIA: You call that a
14 volunteer --

15 MR CAMPBELL: We call that a volunteer.

16 JUSTICE SCALIA: Volunteer. Volunteering to
17 be executed?

18 MR. CAMPBELL: That's the normal term of
19 art.

20 JUSTICE SOTOMAYOR: Given my example, isn't
21 it the case that under the interest of justice standard
22 there will be situations in which a substitution like
23 the one I just posited would be right, that wouldn't be
24 right under your standard?

25 MR. CAMPBELL: Your Honor, I think that

1 actually our standard would cover what is appropriate
2 for protecting the defendant's statutory right to
3 counsel, and that --

4 JUSTICE SOTOMAYOR: Are you suggesting that
5 for noncapital defendants Congress chose to give them
6 more rather than less?

7 MR. CAMPBELL: No, not at all. I don't
8 think noncapital or capital habeas petitioners have any
9 greater, have any greater right to the assistance of
10 counsel.

11 JUSTICE SOTOMAYOR: But you are saying
12 capital have lesser rights.

13 MR. CAMPBELL: My guess -- I don't think
14 this Court has ever drawn a categorical difference
15 between them in terms of what rights are available to
16 them for purposes of representation by counsel.

17 JUSTICE SOTOMAYOR: Isn't delay one of the
18 factors that courts routinely look at under the interest
19 of justice standard?

20 MR. CAMPBELL: Yes. And I -- Once again,
21 any motion for substitution, no matter what standard you
22 use, should be made promptly.

23 JUSTICE SOTOMAYOR: So we go back to Justice
24 Breyer's point that, even under the interest of justice
25 standard, you are claiming there was an error?

1 MR. CAMPBELL: Absolutely. Oh, yes. Yes.
2 We would submit even under that standard it would be an
3 error.

4 Your Honor, unless there is any more
5 questions --

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.
7 Mr. Waxman.

8 ORAL ARGUMENT OF SETH P. WAXMAN
9 ON BEHALF OF THE RESPONDENT

10 MR. WAXMAN: Mr. Chief Justice, and may it
11 please the Court:

12 The court of appeals held that it was an
13 abuse of discretion to deny substitution without making
14 any inquiry, even of counsel, into the specific
15 situation alleged by Mr. Clair. The Court did not hold
16 that Mr. Clair was entitled to substitute counsel. It
17 did not hold that he was entitled to amend his petition.
18 It did not hold that substitute counsel was even
19 required or advised to seek --

20 JUSTICE KAGAN: Isn't he always --

21 CHIEF JUSTICE ROBERTS: So what if last week
22 we get notice from Mr. Clair that he is dissatisfied
23 with his Supreme Court counsel; that communication has
24 broken down; that you plan to argue particular --
25 present particular arguments, and he doesn't want you to

1 do that. Do we have an obligation to conduct an inquiry
2 into his complaint?

3 MR. WAXMAN: I think if you have any
4 obligation whatsoever -- and I want to make clear that
5 there are -- these kinds of letters and requests for
6 last minute substitutions happen all the time and in the
7 mine run there may not be any duty of independent
8 inquiry. If you had one, it would simply be to do what
9 the Court did in March, which is to inquire of the two
10 counsel in the case, is there anything to this, and then
11 rule.

12 CHIEF JUSTICE ROBERTS: No. He says, I
13 turned up new evidence, or I think this is a great
14 argument, and my counsel has told me he is not going to
15 raise it, and I want new counsel who will raise this
16 argument. Will we have to say -- look at it and say,
17 well, we have to figure out is that a good argument; is
18 it better than the ones counsel are going to raise? Has
19 communication broken down?

20 MR. WAXMAN: No, of course not. In this
21 situation, the Court had pending before it a first
22 petition for habeas corpus that alleged both ineffective
23 assistance of counsel at trial and specific Brady
24 violations. And by the way, in answer to your first
25 question, the district judge announced that he was

1 retiring on June 27th, effective the 30th. So this was
2 beforehand.

3 CHIEF JUSTICE ROBERTS: I want to ask you
4 about that. You mention that no fewer than six times in
5 your brief. What is your point, that the judge altered
6 his disposition of a legal matter before him for his
7 personal convenience?

8 MR. WAXMAN: No.

9 CHIEF JUSTICE ROBERTS: Then what is the
10 significance of the fact that he was going to retire?

11 MR. WAXMAN: The -- the significance of the
12 fact that he -- he hadn't announced that he was going to
13 retire. The significance of the fact that he did retire
14 is only to my mind an explanation for why he failed to
15 conduct the minimal inquiry --

16 CHIEF JUSTICE ROBERTS: So you are saying --

17 MR. WAXMAN: -- that he had previously --

18 CHIEF JUSTICE ROBERTS: So you are saying he
19 violated his judicial oath for his own personal
20 convenience, that he failed to do something that you say
21 he should have done, because he was retiring?

22 MR. WAXMAN: I'm not -- he -- The error
23 would have been the same if he had stayed on the bench
24 for another 10 years.

25 CHIEF JUSTICE ROBERTS: So why do you say

1 six times in your brief that the judge was retiring the
2 next day or retired the next day?

3 MR. WAXMAN: Because -- It goes to their
4 complaints with the remedy in the case. That is, they
5 are faulting that the remedy is not: Go back and ask
6 this judge to decide whether substitution was
7 appropriate.

8 CHIEF JUSTICE ROBERTS: There's another
9 judge.

10 MR. WAXMAN: Yes.

11 CHIEF JUSTICE ROBERTS: There's another
12 judge. She's available. I have to say it strikes me,
13 frankly, as argument by innuendo that I think is very
14 unjustified.

15 MR. WAXMAN: Well, I -- I apologize if it
16 gave that impression. I don't mean any innuendo in the
17 case. Our proposition is simply this: Prior to
18 adjudicating the claims of ineffective assistance of
19 counsel and Brady, when the court receives a letter that
20 says, Your Honor, I'm sorry for writing a second time.
21 As you know, I have always maintained that I'm innocent.
22 My investigator has just discovered physical evidence in
23 of the State's files that he believes may clear me. My
24 counsel --

25 JUSTICE KAGAN: Mr. Waxman, what --

1 CHIEF JUSTICE ROBERTS: I'm still trying to
2 get to the point -- I'm sorry. I'm still trying to get
3 to the point of the relevance of the fact that he was
4 retiring.

5 MR. WAXMAN: It goes to the remedy, and it
6 goes to the fact he --

7 CHIEF JUSTICE ROBERTS: How does it go --
8 How does it go to the remedy?

9 MR. WAXMAN: It -- they are alleging that
10 there was an abuse of discretion not to send it back to
11 the judge to do what he had declined to do. And our
12 proposition is, because substitute counsel had been in
13 place for 5 years and because the judge who had
14 superintended the case for 12 years was no longer there,
15 it was appropriate and within the court of appeals'
16 discretion under 28 U.S.C. 2106 to remand it to the new
17 judge, with new counsel, for -- to allow new counsel
18 simply to ask the new judge, who had not heard all of
19 the witnesses or the evidence, to demonstrate why, if
20 counsel thought it was appropriate, to allow him to
21 amend the petition under Rule 15(a)(2).

22 CHIEF JUSTICE ROBERTS: Well, that was
23 the --

24 JUSTICE KAGAN: Mr. Waxman --

25 JUSTICE ALITO: That would be pretty

1 incredible. Maybe that's what's required. Why isn't
2 this is a fair reading of what Judge Taylor did? As of
3 April 29th, as I recall, there was not a problem with
4 the representation. And the decision was made on
5 June 30th. Now, on June 16th, that's the time when
6 Clair sent his letter.

7 By this point, the petition had been pending
8 for a long time before the judge. The judge presumably
9 was approaching the point where he was going to issue
10 his decision. He saw the letter. He could not see any
11 way in which the matters that were discussed in the
12 letters could lead to a claim that would go anywhere.
13 As to the physical evidence, if it couldn't have been
14 tested at the time of trial, there would not have been a
15 Brady obligation, and an actual innocence claim here
16 would be quite far-fetched in light of the very
17 incriminating statements that -- that Mr. Clair made in
18 the tape recorded conversation.

19 Had he substituted counsel, he would not
20 have been under an obligation, I think, to allow
21 substituted counsel to amend the petition, which had
22 been pending for a long period of time. So he said:
23 Counsel is doing a proper job; there doesn't appear to
24 be a conflict of interest; and I'm going to deny this.

25 Now, counsel could have been appointed and

1 in fact was appointed to represent Mr. Clair going
2 forward. Why isn't that a fair reading of what he did?
3 And if so, what need was there for further inquiry?

4 MR. WAXMAN: Well, this -- it may very well
5 be what was in his thought processes, but we don't know
6 that.

7 JUSTICE KENNEDY: But we know what was in
8 his thought processes, Mr. Waxman, because 14 days later
9 he issued a 60 or 61-page opinion with -- dealing with
10 47 different claims, many of which, many of which,
11 related to actual innocence, which was the gravamen of
12 the letter of the complaint on the 16th. So you -- you
13 can't consider the letter just in isolation from the
14 61-page opinion that's issued 16 days later.

15 MR. WAXMAN: Oh, I -- I think that the --
16 that a district judge faced with a request to substitute
17 counsel at this very late stage is appropriately --
18 appropriately takes into account everything that has
19 happened, everything that he has allowed to happen,
20 everything that defense counsel has -- has done, and he
21 is obviously permitted to approach this request with a
22 high degree of skepticism, and a strong --

23 JUSTICE KAGAN: And you are suggesting,
24 Mr. Waxman, that he did not have to make an inquiry in
25 every case, is that right? You are not saying that.

1 MR. WAXMAN: That's right. I mean --

2 JUSTICE KAGAN: So what -- when does a
3 person have to make an inquiry?

4 MR. WAXMAN: Well, of course --

5 JUSTICE KAGAN: What in this case required
6 an inquiry on the judge's part?

7 MR. WAXMAN: I think, you know, if the
8 district judge is presented with factually supported
9 allegations that appointed counsel has failed to pursue
10 newly discovered evidence that may be germane to an
11 issue to be decided, especially where the potential
12 import of that evidence is specifically explicated and
13 corroborated by a willing percipient witness, in this
14 case the investigator who viewed it, the district judge
15 has an obligation simply to ask counsel for the State
16 and counsel for the defense, please respond, as the
17 judge did in June -- in March.

18 Now, in March the judge -- the judge asked
19 for a response --

20 JUSTICE KAGAN: Well, I guess this goes back
21 to Justice Alito's question, but suppose the judge says
22 to himself, even if the response comes in, yes,
23 relations are terrible because the client wants the
24 lawyers to -- to investigate a particular thing and the
25 lawyers don't want to investigate that thing, the judge

1 knows, it doesn't make a difference either way, because
2 he is ready to issue his opinion. And further
3 investigation of this evidence is not going to change
4 his mind as to any material issue. Why should the judge
5 not reject the motion?

6 MR. WAXMAN: Well, because the judge could
7 not know that based on the allegations in the Ford
8 letter and the Clair letter.

9 It is not the case, going to Justice Alito's
10 point from my question to my friend, that what was
11 represented in that letter, the new physical evidence
12 related only to DNA testing. There was a specific
13 allegation that there were fingerprints located at the
14 scene of the crime that previously had been represented
15 to the trial court and to defense counsel either to be
16 unusable or on materials that had gone through the U.S.
17 mail so that the probative value would be limited, and
18 both of those things were untrue.

19 And Mr. Ford said to the judge: "I'm
20 prepared to explain to you exactly what those prints
21 are, and they have not been tested against anyone,
22 including the other people who were suspected of the
23 identical type murder the night before in the same area
24 or other potential suspects in this case like Mr.
25 Henrickson."

1 JUSTICE BREYER: The Ninth Circuit -- I
2 see -- I think I see what they were trying to get at.
3 They want -- they don't see anything practical here to
4 do except to try to get the judge, the district judge,
5 to focus on the question of whether the petition should
6 be amended to assert this kind of claim about the new
7 physical evidence; is that right?

8 MR. WAXMAN: Yes. They were --

9 JUSTICE BREYER: That's where they were
10 trying to go. Okay. Now, suppose you lose this case.
11 Suppose they were to say -- suppose this Court said,
12 well, to tell you the truth, that district judge was
13 operating within his authority in saying that this
14 counsel can continue to represent him. We know
15 subsequently relations broke down and now there is a new
16 counsel. All right?

17 Can't the new counsel go back to the
18 district court and say, judge, we would like to amend
19 the petition so that you will consider, you know,
20 whether it should be amended to include this physical
21 evidence claim? Couldn't he do that?

22 MR. WAXMAN: He can't ask to amend a
23 petition in a case in which there's a final judgment.
24 He could file a -- he could file a Rule 60(b) motion,
25 which he did in this case.

1 JUSTICE BREYER: And what did --

2 MR. WAXMAN: And very --

3 JUSTICE BREYER: I think you answered this,
4 but I can't remember the answer. What happened when he
5 filed the 60(b)? Did they amend the petition or did
6 they consider the thing or not?

7 MR. WAXMAN: No. While the appeal was
8 pending, so that he wouldn't be accused of having simply
9 sat on his rights while the Ninth Circuit was deciding,
10 he filed a Rule 60 -- he filed for leave to file a Rule
11 60(b) motion and said in essence: Look, the
12 investigator has discovered this new evidence; I haven't
13 been able to test it or examine it; please give me leave
14 to do that, because I believe it may support reopening
15 the judgment.

16 The district judge said: I'm not going to
17 allow you to make that motion. The Ninth Circuit issued
18 a mandamus directing the district judge to rule on the
19 motion. She then denied it, essentially finding that
20 the motion should be denied because Mr. Grele,
21 substitute counsel, hadn't already proven to her what it
22 is that he was seeking to find out, that is what does
23 this evidence show.

24 JUSTICE BREYER: So there is no -- so in
25 other words -- what the Ninth Circuit in my view is

1 trying to do is they've worked out some complicated way
2 of trying to get the district court to consider the
3 motion about the new physical evidence.

4 And if that's right, then unless you --
5 there is no way to get there. I don't see how you get
6 there under the law. That's my -- but

7 JUSTICE SOTOMAYOR: Mister --

8 JUSTICE BREYER: I'd just like to know what
9 he's thinking.

10 MR. WAXMAN: I have an answer to your
11 question, but of course I'll defer to any superseding
12 question from --

13 JUSTICE SOTOMAYOR: It has to go with the
14 scope of the remedy that they did.

15 MR. WAXMAN: Uh-huh.

16 JUSTICE SOTOMAYOR: Assuming, as I do and
17 you just said, that what the Ninth Circuit said is there
18 is -- he should have gotten a reason, an explanation,
19 but now there is a new attorney anyway, so what do we
20 do, isn't the normal thing to do just to remand it, to
21 let the district court decide what steps it wants to
22 take, including to decide whether or not it would have
23 granted the motion for substitution if it had heard the
24 explanation?

25 MR. WAXMAN: Yes.

1 JUSTICE SOTOMAYOR: Meaning, there was a new
2 judge. But, that doesn't -- a new judge is never
3 stopped from considering what has happened in the case.

4 MR. WAXMAN: No.

5 JUSTICE SOTOMAYOR: And to decide whether
6 under the facts as they existed at the time.

7 MR. WAXMAN: Of course not. I mean, even
8 the State acknowledges that asking the judge whether or
9 not there should be substitution when there has been
10 substituted counsel since the appeal was taken is, as
11 they call it, an academic exercise. But technically the
12 judge --

13 JUSTICE SOTOMAYOR: But it's not academic.
14 It wasn't academic for the judge below, the new judge --

15 MR. WAXMAN: Well --

16 JUSTICE SOTOMAYOR: -- to say, what happened
17 back then; I don't believe the motion was timely; I
18 don't believe that you were foreclosed from doing other
19 things; motion to substitute would have been denied; end
20 of case.

21 MR. WAXMAN: I guess I'm not sure there is a
22 huge difference between that and what the Ninth Circuit
23 did or what I understand the Ninth Circuit to be doing,
24 which was to issue an order -- basically say the
25 substitution motion had to be decided within the broad

1 discretion that the law allows before entry of judgment.
2 I'm going -- we are going to do as best we can to put
3 Mr. Clair back in that position. It seems to us that
4 since he -- since counsel said, represented, as soon as
5 it was asked after his letter, there is an
6 irreconcilable breakdown and substitution is advised --

7 CHIEF JUSTICE ROBERTS: Counsel --

8 MR. WAXMAN: -- he has counsel and -- I'm
9 sorry.

10 CHIEF JUSTICE ROBERTS: No. I'm trying to
11 help you. I understood you to say you had an answer to
12 Justice Breyer's question?

13 MR. WAXMAN: Yes, I do have an answer to
14 Justice Breyer's question, if I can just -- thank you.
15 If I can just finish answering -- I apologize for my
16 lengthy answers.

17 CHIEF JUSTICE ROBERTS: Why don't you finish
18 your answer to Justice Sotomayor and then go back to
19 Justice Breyer.

20 MR. WAXMAN: Thank you.

21 In essence what has happened, what I
22 understand the court of appeals to have decided is to
23 say: Look, because we have had substitute counsel for 5
24 years and the FPD has said it couldn't continue, we're
25 allowing this to go back and let substitute counsel

1 convince the judge, if it can, if it chooses to, whether
2 or not to exercise its considerable discretion in
3 allowing leave to amend the petition before judgment.
4 The judge may very well say no, and the case is then
5 back before us. But it might say yes. In other words,
6 to do what in essence is the prejudice or materiality
7 inquiry that Judge Taylor would have engaged in if he
8 found that there was a breakdown.

9 If mean, if there's a breakdown and the
10 judge says that the only new evidence is that the moon
11 was in the fifth house and that doesn't depend on
12 anything, I'm denying -- or it was a new moon, I'm
13 denying this.

14 Justice Breyer, I -- I agree with you that
15 the Ninth Circuit was struggling to figure out a way to
16 most efficiently resolve the multiple appeals that were
17 pending in front of them. And they understood from the
18 Rule 60(b) appeal that was also pending and from the
19 appeal on the denial of substitution that there was this
20 newly discovered evidence in the State's files; that the
21 investigator who looked at it thought that it was really
22 important; and they had no record about what it was or
23 whether it should have been considered.

24 Now, they could have said, well, we're going
25 to direct the Rule 60(b) judge to grant leave to examine

1 the physical evidence and analyze it. And it was an
2 abuse of discretion of the Rule 60(b) judge not to allow
3 Mr. Clair at least to make some showing.

4 But the more straightforward way would have
5 been to say: You didn't inquire of counsel; counsel may
6 have had a very good reason for not pursuing this; but
7 in the face of the specific allegation by a willing,
8 percipient witness that there is highly material
9 evidence in the State files and the public defender is
10 refusing to do anything about it, all we think the Ninth
11 Circuit was holding is --

12 JUSTICE GINSBURG: That's like -- Mr.
13 Waxman --

14 MR. WAXMAN: -- it was an abuse of
15 discretion not to ask.

16 I'm sorry, Justice Ginsburg.

17 JUSTICE GINSBURG: Mr. Waxman, I thought
18 this is a case that has been going on for, like, 12
19 years in the district court.

20 MR. WAXMAN: Yes.

21 JUSTICE GINSBURG: And I thought that the
22 basic disagreement between the client and counsel was
23 counsel said: Our best shot is going to be to keep you
24 alive, so we want to do everything we can to change the
25 death sentence, and then -- and we don't want to detract

1 from that by making a claim of actual innocence when
2 the -- there'd be very slim basis for that. So, that's
3 the judgment, and it's a strategic judgment, that
4 counsel made: Our best shot to keep this man alive is
5 to concentrate on the penalty phase.

6 MR. WAXMAN: Justice Ginsburg, if that
7 had -- if the judge had inquired of counsel and counsel
8 had given that reason, that would be something that the
9 Court could evaluate in deciding whether the balancing
10 test that is required by the interests of justice
11 standard satisfied his inquiry. But we don't have
12 any -- I doubt very much that that is what counsel would
13 have said.

14 CHIEF JUSTICE ROBERTS: Counsel, if -- the
15 interests of justice, does that include the available
16 resources of the Federal Public Defender? I mean, those
17 offices are notoriously understaffed. And here you have
18 a situation where one lawyer has been representing an
19 individual for an awful long time, and the defendant
20 says, I want a new lawyer. It's obviously going to take
21 that -- a new lawyer away from their work and put them
22 in a position of having to get up to speed in a new
23 case.

24 And I just wonder if that's part of this --
25 I won't call interest of justice" a standard -- it's an

1 aspiration. But does that go into the calculus?

2 MR. WAXMAN: I would think that that -- not
3 only that goes into the calculus, but all of the I would
4 say well-articulated doctrines that Congress and this
5 Court have applied essentially establishing presumptions
6 against reopening long-litigated matters, whether --

7 CHIEF JUSTICE ROBERTS: Well, that gets to
8 my --

9 MR. WAXMAN: All of those things go into the
10 interest of justice balancing. There's no doubt about
11 it.

12 CHIEF JUSTICE ROBERTS: Is the -- is the
13 person in a different position with the new counsel than
14 he would have been with the old concerning the standards
15 about reopening things? In other words, do we say,
16 well, what would the old counsel have been able to do
17 with respect to reopening, and say, well, that's all the
18 new counsel can do? In other words, new counsel doesn't
19 allow you to circumvent the various --

20 MR. WAXMAN: Of course.

21 CHIEF JUSTICE ROBERTS: -- the restrictions
22 that you just talked about.

23 MR. WAXMAN: Of course -- of course not.
24 The only point is, what -- what Clair was basically
25 saying is, my investigator has just found evidence that

1 he believes is highly exculpatory, physical evidence in
2 the State's files that was previously represented not to
3 exist. My counsel is refusing to do anything about it.
4 Please give me somebody, whether it's -- have my counsel
5 do it or some new counsel, to present this to the judge,
6 just so the judge can decide in evaluating these, the
7 Brady and the ineffective assistance claim. And if this
8 is as represented, it could be highly material to those
9 claims.

10 CHIEF JUSTICE ROBERTS: And one of the
11 things I think the district court would do in that
12 situation with the same counsel is say: Look, this was
13 a tactical strategic decision of the lawyer. You don't
14 get to reopen something because of that. Now, does that
15 same consideration apply with respect to the substituted
16 counsel, or does the substituted counsel allow the
17 defendant to get a leg up on the process, and make new
18 arguments that the old counsel couldn't make?

19 MR. WAXMAN: Well, I think that in a
20 value -- if substitute counsel -- if there is a remand
21 in this case and substitute counsel makes a Rule 15
22 motion, the Court will evaluate that under the broad
23 interests of justice standard. I mean, whoever the
24 counsel is has to acquit his or her professional
25 obligations.

1 It may very well have been,
2 Mr. Chief Justice, that if Judge Taylor had said, look,
3 I -- please write to me in 3 days or let's have a status
4 conference and explain to me what's going on; I
5 understand you went to see this evidence. Why aren't
6 you -- is it true that you are not pursuing it? And if
7 so, why not?

8 That would have completely acquitted the
9 judge's responsibility.

10 JUSTICE SCALIA: Mr. Waxman, the State
11 contends that the interests of justice standard is not
12 the right one. Why do you contend that it is? It
13 doesn't appear in -- in 3599, even though it did appear
14 in -- in the previous provision that used to cover these
15 cases, which is 3006A(c). You want to carry it over
16 from 3006A(c) to 3599. That -- that seems to me a
17 little strange when they seemingly intentionally omitted
18 it.

19 MR. WAXMAN: Well, I don't think it's
20 strange, Justice Scalia. And let me explain at least my
21 own reaction to this. 3599, what -- the mandatory
22 appointment requirement was cleaved from what is now
23 3006 -- the discretionary appointment, where Congress
24 said in the Controlled Substances Act, look, in death
25 cases, at trial and in habeas, we're not -- we don't

1 want to leave it to the court's or the magistrate's
2 discretion whether or not to appoint. We are
3 appointing.

4 And when it did so -- I mean, it is in
5 essence a -- a -- a progeny -- I mean, it is -- it is a
6 cleaving of what was a discretionary obligation.
7 Congress -- Congress had no need in 3599 to reiterate
8 the language in 30 -- 3006A(c), which itself is not
9 limited to appointments under 3006A(c).

10 I am reading from page 95 of the petition
11 appendix. The statute says -- I'm sorry. It's page 93.
12 The interests of justice standard says this -- and
13 I'm -- it's the last sentence on page 93A -- "the United
14 States magistrate judge or the Court may in the
15 interests of justice substitute one appointed counsel
16 for another at any stage of the proceedings." It
17 doesn't say "counsel appointed under the discretionary
18 authority of 3006."

19 If, like the rest of subsection (c), of
20 which it is a part, is a general rule for duration and
21 substitution of appointments. So even if it were not
22 true that the sentence itself applied a force, it's, I
23 think, only consistent with what Congress's manifest
24 intention in enacting 35 -- what became 3599(e) to
25 permit that when substitution is requested, that motion

1 be adjudicated in light of the interests of justice.

2 And indeed, that's what the State told Judge
3 Taylor the standard was in this very case. I mean, look
4 at it this way, Justice Scalia: imagine that a district
5 court -- I realize that the cases will be few and far
6 between. Very few, and very far between -- where at a
7 late stage of the proceedings, the Court will interject
8 substitution of counsel over the State's opposition, and
9 over the Court's understandable desire to serve the
10 public interest in efficiently and fairly adjudicating
11 motions.

12 But in the rare case where the district
13 judge says, gee, I think the public interests -- I think
14 that the interests of justice really would support
15 putting somebody else in here, but I can't because it
16 doesn't fit within one of the three boxes of the tests
17 that the State ex malo has announced in its merits brief
18 in this Court, it's just impossible to imagine that
19 Congress would have wanted a judge to say, gee, this is
20 one of these one in a million cases where the interests
21 of justice really requires, but I can't do it --

22 JUSTICE ALITO: But the interests of justice
23 is such an open-ended test. If that is the test,
24 doesn't it follow that it will only be in the rarest of
25 cases that a district judge will have been found -- will

1 be found to have abused his or her discretion in denying
2 a substitution request?

3 Why does that very broad standard help you
4 here?

5 MR. WAXMAN: I mean, we don't -- we're not
6 really arguing about the standard one way or the other.
7 The point -- the only real question in this case is
8 whether whatever the standard is -- and we think it has
9 to be something like interests of justice -- but a judge
10 in this particular situation with respect to this
11 particular set of circumstances, there is -- my
12 investigator, a willing percipient witness has gone to
13 the police station and found evidence that he believes
14 may well clear me, it requires at a minimum that the
15 judge --

16 JUSTICE KAGAN: Does your argument --

17 JUSTICE ALITO: I know you think there
18 should be inquiry.

19 MR. WAXMAN: I'm sorry?

20 JUSTICE ALITO: Before your time runs out,
21 how would the finger -- how would the fact that there
22 were fingerprints at the scene that do not match anybody
23 who was known to be in that house have provided evidence
24 for -- provided the basis for any claim that could have
25 established Mr. Clair's innocence at this late -- at

1 this late date, in the face of the other evidence that
2 was present in this case: the recorded statements?

3 MR. WAXMAN: Well, first of all, the other
4 evidence in this -- the case against Mr. Clair in
5 essence was the wired statement that he made. And even
6 the trial judge in this case said only of that equivocal
7 statement, that it was "capable of being regarded as an
8 admission."

9 Now, we don't disagree with that. We're
10 not --

11 JUSTICE KAGAN: Did -- does your argument
12 depend on a notion that the evidence against the
13 defendant was weak? In other words, if there were a
14 great deal of evidence against the defendant, would you
15 be making the same argument, that the judge still had a
16 duty to inquire? Or are you asking us essentially to
17 make a determination that this was an iffy case to begin
18 with?

19 MR. WAXMAN: Well, I think the answer -- I
20 know how frustrating this is, but I think the answer is
21 to both -- is yes to both scenarios, particularly
22 because there was no physical evidence linking him, and
23 really, the State's case boiled down to this pretty
24 confusing statement. It was particularly salient to
25 say, wait a minute. I mean, the -- the district judge

1 had no idea that there was any dispute about physical
2 evidence, or any physical evidence was in the State's
3 files that hadn't been disclosed and hadn't been --

4 JUSTICE ALITO: Well, suppose defense
5 counsel had introduced at trial fingerprint evidence
6 showing that 10 people were present at some point in
7 that house and they weren't people who lived there.
8 That's -- it's weak exculpatory evidence for the
9 defendant at best that there were unknown people in the
10 house. It might have been the cable guy. Who knows who
11 they were? So it doesn't help very much.

12 MR. WAXMAN: Justice Alito, I mean, we are
13 of course all arguing in a vacuum here, because we don't
14 know what the fingerprint evidence if it were tested and
15 run against databases would show. But let me give you
16 one not at all far-fetched example: the State had --
17 the county coroner had determined that because of the
18 extraordinary similarity between the murder of a woman
19 in the neighborhood -- very close by the night before
20 and this one, including the very peculiar puncture
21 injuries, the coroner's report in the State's file said
22 this is very likely the same perpetrator.

23 The State has identified the perpetrator of
24 that other crime. And we don't know whether even at
25 this day the State has matched that perpetrator's

1 fingerprints with the fingerprints that were discovered
2 next to the victim in this case. And it wouldn't be
3 far-fetched to say that in a case involving either
4 Brady -- may I finish, it will just be this sentence --
5 Brady or ineffective assistance of counsel, if the
6 fingerprint evidence did link up in that way, it
7 certainly would go into the habeas judge's evaluation of
8 the merits of those claims.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 Mr. Campbell, you have three minutes
11 remaining.

12 REBUTTAL ARGUMENT OF WARD A. CAMPBELL

13 ON BEHALF OF THE PETITIONER

14 JUSTICE SOTOMAYOR: Can you tell us whether
15 that testing has been done or not?

16 MR. CAMPBELL: No, I don't believe that
17 testing has been done.

18 JUSTICE SOTOMAYOR: I'm sorry, no, you don't
19 think it has been?

20 MR. CAMPBELL: No, I don't. I don't. The
21 testing has not been done. The only testing I am aware
22 of is the testing that's discussed in the appendix.

23 JUSTICE SOTOMAYOR: In the appendix.

24 MR. CAMPBELL: Which excluded Mr. Goh, who
25 apparently was the perpetrator of the other murderer,

1 from having any DNA at the scene of the Rodgers murder.

2 And Mr. Goh is dead now, so --

3 JUSTICE SOTOMAYOR: I'm sorry. Then your
4 answer is yes, Mr. Goh's prints don't match the prints
5 found in the file.

6 MR. CAMPBELL: We -- I am not aware -- the
7 answer is, I am not -- there has been no test comparison
8 of the fingerprints of Mr. Goh, to my -- to my
9 knowledge, in with the -- what was found at the Rodgers
10 murder. The only testing that we have is the testing
11 that is in the appendix to the opposition to cert
12 regarding the DNA comparisons that were done.

13 JUSTICE SOTOMAYOR: That doesn't worry your
14 prosecutor's office?

15 MR. CAMPBELL: I think that the problems
16 that the -- from the standpoint of the prosecutor's
17 office, the -- nothing that could be found about this
18 case would undercut the fact that Mr. Clair --

19 JUSTICE SOTOMAYOR: If the fingerprints that
20 were found at the scene of this crime matched Goh, that
21 wouldn't give you pause?

22 MR. CAMPBELL: It would -- it would
23 certainly be a -- it would certainly -- I think it would
24 give them pause.

25 JUSTICE SOTOMAYOR: I'm sorry, what?

1 MR. CAMPBELL: I think -- I think it would
2 give them pause, but the fact is --

3 JUSTICE SOTOMAYOR: So why hasn't the test
4 been done?

5 MR. CAMPBELL: I don't know why the testing
6 has not been done. But whatever the testing would be,
7 the fact is, Mr. Clair made numerous admissions and
8 numerous statements implicating himself in the murder of
9 Linda -- Ms. Rodgers during the taped conversation that
10 he had with Ms. Flores, which also corroborated
11 Ms. Flores' testimony about his involvement in that
12 murder. And that is the critical -- the critical
13 evidence in this case. Now, the California Supreme
14 Court, which has had this information in front of it,
15 has also in fact denied already a petition based on the
16 available evidence about the murders.

17 I think also if you look --

18 JUSTICE SCALIA: You -- you don't think it's
19 an iffy case?

20 MR. CAMPBELL: No, not based on that State's
21 statement. The State's statements are filled with
22 implied -- implied admissions about what he did with the
23 jewelry, about trying to evade her questions about the
24 case, to do anything to try to avoid having to really
25 confront himself directly with involvement in the case.

1 It's a -- it really is a very damning -- damning tape --

2 JUSTICE GINSBURG: But all that's what --
3 what he told his girlfriend, right? There is nothing
4 else. There is only that?

5 MR. CAMPBELL: Well, I think the point of it
6 is that the tape -- she testified, and the tape
7 corroborates her testimony. So in fact, what you have
8 is -- you -- you have mutual reinforcement.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.
10 The case is submitted.

11 (Whereupon, at 11:03 a.m., the case in the
12 above-entitled matter was submitted.)

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abandon 23:2	adverse 15:20	analogizing	apply 8:11,18	aspiration 44:1
abandoned 23:1	adversely 14:14	17:19	45:15	assert 36:6
abandonment	advised 27:19	analogous 16:22	appoint 47:2	assistance 17:1
24:8,9	40:6	analyze 42:1	appointed 6:15	17:22 26:9
abide 23:25	advocate 15:22	announced 4:10	18:6,8 22:21	28:23 30:18
able 37:13 44:16	affect 14:14	28:25 29:12	32:25 33:1 34:9	45:7 52:5
above-entitled	agent 24:11,15	48:17	47:15,17	assuming 8:22
1:11 55:12	agree 18:20	answer 14:5,19	appointing 47:3	9:10 15:11
Absolutely 27:1	41:14	18:13 28:24	appointment	21:13 38:16
abuse 18:24,25	ahead 10:15	37:4 38:10	15:8 23:15	assumptions 9:3
21:11,16,18,25	Alito 5:24 6:4,7	40:11,13,18	46:22,23	attorney 1:15
22:3,4 27:13	7:2,5 11:3,18	50:19,20 53:4,7	appointments	12:18 23:18,25
31:10 42:2,14	31:25 48:22	answered 37:3	47:9,21	24:14,18 38:19
abused 49:1	49:17,20 51:4	answering 40:15	approach 33:21	attorneys 3:19
academic 39:11	51:12	answers 14:16	approaching	24:20
39:13,14	Alito's 34:21	40:16	32:9	attorney-client
accept 4:24 9:10	35:9	anybody 23:5	appropriate	14:2
acceptable 19:8	alive 42:24 43:4	49:22	10:11 14:3	authority 18:18
accepted 4:23	allegation 9:20	anyway 5:2	15:12 19:24,25	21:1 23:23
accorded 20:14	9:24 10:17 15:6	38:19	21:21 22:13,16	36:13 47:18
account 33:18	15:17 35:13	apologize 30:15	26:1 30:7 31:15	automatically
accused 37:8	42:7	40:15	31:20	21:18
acknowledges	allegations 10:12	apparently 52:25	appropriately	available 10:22
39:8	34:9 35:7	appeal 6:11,13	33:17,18	11:11,17 26:15
acquit 45:24	allege 19:9	9:8 12:25 37:7	April 32:3	30:12 43:15
acquitted 46:8	alleged 27:15	39:10 41:18,19	area 24:17 35:23	54:16
act 21:7 24:11	28:22	appeals 8:11	areas 18:14,15	avenue 12:4
46:24	alleging 31:9	16:14 18:17	argue 27:24	avoid 54:24
acted 20:5,25	allow 31:17,20	27:12 31:15	arguing 49:6	awaiting 14:10
acting 15:22	32:20 37:17	40:22 41:16	51:13	aware 52:21 53:6
action 4:2 5:21	42:2 44:19	appear 5:6 21:6	argument 1:12	awful 43:19
10:24 16:5	45:16	32:23 46:13,13	2:2,5,8 3:3,6	a.m 1:13 3:2
actual 11:18,20	allowed 33:19	APPEARANC...	23:18 27:8	55:11
22:17 32:15	allowing 40:25	1:14	28:14,16,17	
33:11 43:1	41:3	appellate 13:2	30:13 49:16	B
additional 4:23	allows 40:1	13:22	50:11,15 52:12	back 11:14,16
4:25 5:17,25	altered 29:5	appendix 7:14	arguments 8:6	16:1 20:20
10:21	alternative 15:24	47:11 52:22,23	27:25 45:18	26:23 30:5
adjudicated 48:1	amend 27:17	53:11	art 25:19	31:10 34:20
adjudicating	31:21 32:21	applied 9:12	aside 19:17	36:17 39:17
30:18 48:10	36:18,22 37:5	19:12,14 44:5	asked 3:21 14:4	40:3,18,25 41:5
admission 50:8	41:3	47:22	34:18 40:5	balancing 43:9
admissions 54:7	amended 36:6,20	applies 9:11	asking 39:8	44:10
54:22	Amendment	13:13 16:1	50:16	bar 17:5
	16:24 17:21,25	18:19	aspect 19:3	based 9:3,15

11:1,22 22:4 35:7 54:15,20 basic 23:7,22,23 24:5 42:22 basically 9:2 15:21 39:24 44:24 basis 5:9 10:14 17:16 22:13 43:2 49:24 beginning 22:20 23:16 behalf 1:16,18 2:4,7,10 3:7 27:9 52:13 believe 37:14 39:17,18 52:16 believes 30:23 45:1 49:13 bench 29:23 best 40:2 42:23 43:4 51:9 better 28:18 beyond 18:19 boiled 50:23 borrowing 21:4 bothering 19:12 boxes 48:16 Brady 11:4 28:23 30:19 32:15 45:7 52:4,5 breakdown 12:18 13:4 40:6 41:8,9 Breyer 18:11 19:5,11,14 20:2 20:11,18 36:1,9 37:1,3,24 38:8 40:19 41:14 Breyer's 26:24 40:12,14 brief 29:5 30:1 48:17 briefing 3:16 4:18,19	briefs 8:5 broad 39:25 45:22 49:3 broke 36:15 broken 9:7 14:2 27:24 28:19 brought 25:4 <hr/> C <hr/> c 2:1 3:1 47:19 cable 51:10 calculus 44:1,3 California 1:16 6:25 12:3 54:13 call 19:19 20:1 22:10 25:11,13 25:15 39:11 43:25 calling 19:19 Campbell 1:15 2:3,9 3:5,6,8 4:8,17 5:15 6:3 6:6,9 7:4,8,19 8:8,17 9:16 10:7,10 11:7,20 12:11,14,23 13:11,17 14:8 14:22 15:5,16 16:4,11,15,19 16:22 17:9,18 19:3,6,13,22 20:8,16 21:2,16 22:9 23:6,10,14 23:20 24:4,10 24:16 25:9,15 25:18,25 26:7 26:13,20 27:1 52:10,12,16,20 52:24 53:6,15 53:22 54:1,5,20 55:5 capable 50:7 capital 17:7,14 22:21,21 26:8 26:12	carry 46:15 case 3:4,17 4:3 4:25 5:11 10:17 10:18,19,20 11:9 14:9,15,24 16:13 18:16 20:3,23 21:24 23:3,13,17 24:5 25:21 28:10 30:4,17 31:14 33:25 34:5,14 35:9,24 36:10 36:23,25 39:3 39:20 41:4 42:18 43:23 45:21 48:3,12 49:7 50:2,4,6 50:17,23 52:2,3 53:18 54:13,19 54:24,25 55:10 55:11 cases 17:4 20:21 25:2 46:15,25 48:5,20,25 categorical 26:14 category 24:25 caused 21:3 cert 53:11 certain 12:15 certainly 12:2 17:11 19:3 52:7 53:23,23 certiorari 7:15 challenges 3:13 22:22 change 20:6 35:3 42:24 Chief 3:3,8 4:5 21:10 27:6,10 27:21 28:12 29:3,9,16,18 29:25 30:8,11 31:1,7,22 40:7 40:10,17 43:14	44:7,12,21 45:10 46:2 52:9 55:9 choice 17:17 chooses 41:1 chose 26:5 circuit 6:19,24 9:11 11:8 14:1 21:3,23 36:1 37:9,17,25 38:17 39:22,23 41:15 42:11 Circuit's 8:19,22 19:7,23 21:20 circumstances 19:15 21:8 49:11 circumvent 44:19 claim 11:4,14,19 11:21,23 12:1,3 12:4,5,7 32:12 32:15 36:6,21 43:1 45:7 49:24 claiming 26:25 claims 10:23 13:7,19 16:25 17:1,21,25 30:18 33:10 45:9 52:8 Clair 1:6 3:4,18 3:24 4:3,6,22 5:3 6:11,12,15 6:22 9:19 15:2 19:9 22:15 27:15,16,22 32:6,17 33:1 35:8 40:3 42:3 44:24 50:4 53:18 54:7 Clair's 3:10,22 5:5,11,16 7:25 9:19,23,23 10:20 11:13 49:25	clear 4:24 11:21 28:4 30:23 49:14 cleaved 46:22 cleaving 47:6 client 3:24 9:7 23:2,2,21 24:3 24:5,11 25:4 34:23 42:22 clients 24:21,22 close 22:8 51:19 cognizable 10:23 11:23 12:1 come 9:4 comes 19:2 23:17 34:22 coming 4:14 communication 13:21 14:13 27:23 28:19 communications 9:7 12:18 13:4 comparison 53:7 comparisons 53:12 complain 19:9 complained 4:3 complaint 3:22 5:3,16 15:2 18:24 19:4,25 28:2 33:12 complaints 30:4 complete 12:18 completely 14:10 46:8 complicated 38:1 concentrate 43:5 concentrating 8:7 concept 17:23 concern 19:21,22 concerning 44:14 concluded 5:9 conclusion 5:9 conduct 10:16
--	---	---	---	---

28:1 29:15 conference 46:4 conferring 3:23 confined 21:14 conflict 5:7 13:5 13:5 15:20 23:4 32:24 confront 54:25 confusing 50:24 confusion 20:17 21:2 Congress 16:17 21:7 26:5 44:4 46:23 47:7,7 48:19 Congress's 17:17 47:23 connection 7:7 consider 6:19 33:13 36:19 37:6 38:2 considerable 41:2 consideration 45:15 considered 16:18 24:17 41:23 considering 39:3 consistent 47:23 constitutional 20:14 construction 17:11 contact 13:21 contend 46:12 contends 46:11 context 16:4 17:9 17:12,13 18:1 18:10 21:9 continue 3:24 9:9 36:14 40:24 control 24:21 Controlled 46:24 controls 24:3 convenience	29:7,20 conversation 32:18 54:9 conviction 22:22 convince 41:1 coroner 51:17 coroner's 51:21 corpus 3:11 6:23 6:25 10:24 11:24 12:8 16:5 28:22 correct 5:15 6:3 8:16 14:21,22 20:16 corroborated 34:13 54:10 corroborates 55:7 counsel 3:21 5:4 5:5 6:15,16 8:4 8:13 12:12 13:3 15:9,18,19,20 16:6,25 17:1,2 17:13,13,22,22 18:3,6,8,8 19:10 20:6,15 22:14,17,19,21 22:21,24 23:1,1 23:2,3 25:2,3,5 26:3,10,16 27:6 27:14,16,18,23 28:10,14,15,18 28:23 30:19,24 31:12,17,17,20 32:19,21,23,25 33:17,20 34:9 34:15,16 35:15 36:14,16,17 37:21 39:10 40:4,7,8,23,25 42:5,5,22,23 43:4,7,7,12,14 44:13,16,18,18 45:3,4,5,12,16 45:16,18,20,21	45:24 47:15,17 48:8 51:5 52:5 52:9 55:9 Counsel's 23:4 county 5:20 7:10 51:17 couple 7:22 course 12:24 13:2 21:17 28:20 34:4 38:11 39:7 44:20,23,23 51:13 court 1:1,12 3:9 3:12,12 4:1,2,4 4:6,10,23 5:4,8 6:17,18,19,20 7:1 8:11,12,24 9:11,14,18 10:13,13,15 11:1,25 12:20 13:8,25 14:18 14:20,25 15:3 15:14 16:14,14 16:23 17:11,20 17:24,24 18:17 20:5 21:13,17 22:24 26:14 27:11,12,15,23 28:9,21 30:19 31:15 35:15 36:11,18 38:2 38:21 40:22 42:19 43:9 44:5 45:11,22 47:14 48:5,7,18 54:14 courts 17:16 26:18 court's 11:22 21:1 47:1 48:9 cover 26:1 46:14 crime 7:11,12 35:14 51:24 53:20 criteria 23:5	critical 54:12,12 <hr/> D <hr/> D 3:1 damning 55:1,1 databases 51:15 date 50:1 day 4:11 22:7 30:2,2 51:25 days 7:22 33:8 33:14 46:3 dead 53:2 deadline 4:15,17 deal 25:4 50:14 dealing 33:9 deals 17:24 death 42:25 46:24 December 1:9 decide 30:6 38:21,22 39:5 45:6 decided 34:11 39:25 40:22 decides 10:2 deciding 20:13 37:9 43:9 decision 4:3,7,13 5:1 8:22 12:19 13:16 14:11,19 19:1,16 23:17 32:4,10 45:13 decisionmaking 23:22 decisions 9:21 22:15 23:23 24:3,5,19,20 declarations 4:23,24 declined 31:11 defendant 12:24 17:8 22:23 23:17 43:19 45:17 50:13,14 51:9	defendants 26:5 defendant's 26:2 defender 3:23 5:19,22 6:12 9:22 10:3 13:25 14:4 42:9 43:16 defenders 10:6,9 defender's 3:20 9:6 defense 33:20 34:16 35:15 51:4 defer 38:11 defined 21:20 definition 24:9 degree 33:22 delay 26:17 deliberate 21:7 demonstrate 31:19 denial 6:13 17:1 17:22 22:17 41:19 denied 6:10,18 6:21 14:6 15:7 18:6 37:19,20 39:19 54:15 deny 27:13 32:24 denying 5:5,10 8:12 41:12,13 49:1 depend 41:11 50:12 Deputy 1:15 desire 48:9 determination 50:17 determine 8:25 determined 51:17 detract 42:25 developments 11:12 die 22:23 difference 26:14
---	---	--	--	--

35:1 39:22 different 8:5 33:10 44:13 direct 41:25 directing 37:18 direction 15:1 directly 54:25 disagree 50:9 disagreed 9:20 disagreement 11:4 42:22 disagreements 19:9 22:14 disagrees 10:5 disclosed 51:3 discovered 30:22 34:10 37:12 41:20 52:1 discovery 3:14 discretion 15:1 20:5 21:12,13 21:16,18 22:1,3 22:4 27:13 31:10,16 40:1 41:2 42:2,15 47:2 49:1 discretionary 21:1 46:23 47:6 47:17 discussed 16:17 32:11 52:22 disposition 8:19 29:6 dispute 9:1,5 51:1 dissatisfaction 3:19 dissatisfied 27:22 district 3:11,12 4:10 5:4,8 6:17 6:18,19,20 8:12 8:24 9:13,18 13:25 14:5,5,18 14:20,25 15:3	15:13,13 16:14 18:13,15 19:1 19:15 20:5 21:1 21:13 22:24 28:25 33:16 34:8,14 36:4,12 36:18 37:16,18 38:2,21 42:19 45:11 48:4,12 48:25 50:25 divided 16:23 dividing 16:25 17:20 DNA 5:23 7:21 7:25 8:2 35:12 53:1,12 doctrines 44:4 doing 5:6 10:1 32:23 39:18,23 domain 24:18 doubt 43:12 44:10 drawn 26:14 duration 47:20 duty 28:7 50:16 D.C 1:8,18 <hr/> E E 2:1 3:1,1 earlier 14:19,21 effective 29:1 effectiveness 18:21 efficiently 41:16 48:10 either 17:14 35:1 35:15 52:3 enacting 47:24 enforcement 5:20 7:10 engage 15:4 engaged 41:7 entertain 6:17 12:3 entire 13:6	entitled 15:7 18:2,4 22:24 27:16,17 entitlement 18:3 entry 40:1 equivocal 50:6 error 11:14 18:18 24:8 26:25 27:3 29:22 especially 12:7 14:9 34:11 ESQ 1:15,18 2:3 2:6,9 essence 37:11 40:21 41:6 47:5 50:5 essential 13:23 essentially 37:19 44:5 50:16 established 49:25 establishing 44:5 evade 54:23 evaluate 43:9 45:22 evaluating 45:6 evaluation 52:7 evidence 5:14,17 5:20,23,25 7:7 7:9 10:18,19,20 10:22 11:5,10 28:13 30:22 31:19 32:13 34:10,12 35:3 35:11 36:7,21 37:12,23 38:3 41:10,20 42:1,9 44:25 45:1 46:5 49:13,23 50:1,4 50:12,14,22 51:2,2,5,8,14 52:6 54:13,16 evidentiary 3:15 ex 48:17	exactly 8:25 35:20 examine 37:13 41:25 examined 5:18 example 22:20 25:20 51:16 excellent 5:8 excluded 52:24 exculpatory 45:1 51:8 Excuse 13:11 executed 25:11 25:17 exercise 39:11 41:2 exercising 14:25 exhausted 12:2 13:7 exist 45:3 existed 39:6 expected 4:13 15:19 explain 35:20 46:4,20 explanation 10:5 10:9 29:14 38:18,24 explicated 34:12 expressing 3:18 extensions 4:19 extensive 3:16 5:10 extent 7:20 14:3 17:19 18:4 extra 14:23 extraordinary 51:18 <hr/> F face 42:7 50:1 faced 33:16 fact 4:9,21 10:10 10:14,21 11:11 12:3 14:11,18	14:23,24 15:7 16:5,7 17:19,23 18:2,7,23 21:3 24:1,10,17 29:10,12,13 31:3,6 33:1 49:21 53:18 54:2,7,15 55:7 factors 16:2 26:18 facts 9:15 39:6 factual 5:8 11:23 factually 34:8 failed 29:14,20 34:9 failure 9:1 11:16 23:25 24:1,10 24:14 fair 32:2 33:2 fairly 48:10 familiar 12:9 17:23 far 14:24,25 17:20 48:5,6 far-fetched 32:16 51:16 52:3 faulting 30:5 Federal 3:10,11 3:12,20,22 5:19 5:22 6:12 9:6 9:18,22 10:3,6 10:9,23 11:24 12:8 16:5 43:16 feeling 21:19 fewer 29:4 fifth 41:11 figure 20:19 28:17 41:15 file 36:24,24 37:10 51:21 53:5 filed 6:11,12,13 6:16,22,24 23:24,24 37:5
--	---	--	---	---

37:10,10 files 30:23 41:20 42:9 45:2 51:3 filing 4:18 filled 54:21 final 36:23 find 37:22 finding 5:5 10:14 37:19 fine 19:16 finger 49:21 fingerprint 51:5 51:14 52:6 fingerprints 35:13 49:22 52:1,1 53:8,19 finish 40:15,17 52:4 first 3:4 12:8 23:17 25:5 28:21,24 50:3 fit 48:16 fixed 18:9,11 Flores 54:10,11 focus 8:6 36:5 follow 13:15 24:14 48:24 force 47:22 Ford 35:7,19 foreclosed 39:18 forensic 11:10 11:13 forget 9:13 forth 7:13 9:15 forums 13:20 forward 33:2 found 8:2 41:8 44:25 48:25 49:1,13 53:5,9 53:17,20 FPD 40:24 frankly 30:13 frequently 25:3 friend 35:10 front 3:12 41:17	54:14 frustrating 50:20 further 4:2 5:21 10:17,25 33:3 35:2 <hr/> G G 3:1 gee 48:13,19 general 1:16 47:20 germane 34:10 Ginsburg 4:15 5:12 13:24 16:20 42:12,16 42:17,21 43:6 55:2 girlfriend 55:3 give 22:19 26:5 37:13 45:4 51:15 53:21,24 54:2 given 14:4,9 18:2 25:20 43:8 gives 17:6 giving 16:1 go 10:15 20:3,20 26:23 30:5 31:7 31:8 32:12 36:10,17 38:13 40:18,25 44:1,9 52:7 goes 19:24 30:3 31:5,6 34:20 44:3 Goh 52:24 53:2,8 53:20 Goh's 53:4 going 4:13 13:10 13:13,15 14:13 17:5 22:8 28:14 28:18 29:10,12 32:9,24 33:1 35:3,9 37:16 40:2,2 41:24	42:18,23 43:20 46:4 good 10:1 18:25 28:17 42:6 gotten 38:18 grant 21:14 41:25 granted 38:23 gravamen 33:11 great 28:13 50:14 greater 26:9,9 Grele 37:20 guess 26:13 34:20 39:21 guilt 3:13 10:21 guy 51:10 <hr/> H habeas 3:10 6:23 6:25 10:23 11:24 12:8,19 13:1,14,15 16:5 17:10,14 26:8 28:22 46:25 52:7 happen 28:6 33:19 happened 6:5,8 7:6 8:24 33:19 37:4 39:3,16 40:21 happens 18:24 25:2 hear 3:3 heard 6:20 31:18 38:23 hearing 3:15 4:19 8:25 9:4 10:16 hears 10:3 held 12:1 27:12 help 40:11 49:3 51:11 Henrickson	35:25 high 33:22 higher 17:5 highly 42:8 45:1 45:8 hold 8:25 27:15 27:17,18 holding 42:11 Honor 4:8 5:15 8:17 10:10 12:23 13:17 17:18 19:22 20:17 22:9 23:11 25:25 27:4 30:20 horrendous 18:16,18 house 41:11 49:23 51:7,10 huge 39:22 <hr/> I idea 51:1 identical 35:23 identified 51:23 iffy 50:17 54:19 imagine 48:4,18 implicate 12:21 implicating 54:8 implied 54:22,22 import 34:12 important 19:4,5 19:6 41:22 impossible 48:18 impression 30:16 improperly 9:12 inadequate 12:19 inappropriate 21:9 include 36:20 43:15 including 19:19 35:22 38:22 51:20	incorrect 8:20 incredible 32:1 incriminating 32:17 independent 28:7 indicated 5:16,18 11:25 individual 43:19 ineffective 17:1 17:21 28:22 30:18 45:7 52:5 inference 4:12 information 7:13 54:14 initial 4:17 initiate 10:16 injuries 51:21 innocence 11:19 11:20,23 32:15 33:11 43:1 49:25 innocent 30:21 innuendo 30:13 30:16 inquire 9:14 28:9 42:5 50:16 inquired 43:7 inquiries 22:5 inquiry 9:15 10:16 11:1 14:21 15:4,14 15:14,16,17 16:17 21:22 27:14 28:1,8 29:15 33:3,24 34:3,6 41:7 43:11 49:18 inserted 21:6 inserting 21:5 instruction 24:1 intention 47:24 intentionally 46:17 interest 5:7 8:15
---	--	--	---	--

8:22 9:11 12:20 13:5 15:12,20 15:24,25 16:3,7 16:7,8 17:11,17 18:8,22 19:19 21:4 22:8,10 23:4 25:21 26:18,24 32:24 43:25 44:10 48:10 interests 43:10 43:15 45:23 46:11 47:12,15 48:1,13,14,20 48:22 49:9 interject 48:7 introduced 51:5 investigate 34:24,25 investigated 5:18 investigation 11:1 35:3 investigative 9:21 22:15 24:19 investigator 5:13 30:22 34:14 37:12 41:21 44:25 49:12 invoked 8:23 involvement 54:11,25 involving 52:3 irreconcilable 13:4 40:6 isolation 33:13 issue 4:3,6 22:2 25:7,9 32:9 34:11 35:2,4 39:24 issued 4:4 5:4 33:9,14 37:17 issues 25:5	<hr/> J <hr/> jewelry 54:23 job 5:6 32:23 judge 3:12,14,18 3:21 4:10 10:2 14:5,6 17:6,7 18:13,15 19:1 19:15 21:23 22:1 28:25 29:5 30:1,6,9,12 31:11,13,17,18 32:2,8,8 33:16 34:8,14,17,18 34:18,21,25 35:4,6,19 36:4 36:4,12,18 37:16,18 39:2,2 39:8,12,14,14 41:1,4,7,10,25 42:2 43:7 45:5 45:6 46:2 47:14 48:2,13,19,25 49:9,15 50:6,15 50:25 judges 9:14 judge's 34:6 46:9 52:7 judgment 36:23 37:15 40:1 41:3 43:3,3 judicial 29:19 juncture 13:19 13:23 June 4:11,14 5:2 5:2 9:19 15:1 29:1 32:5,5 34:17 jurisprudence 11:22 16:24 justice 3:3,8 4:5 4:15 5:12,24 6:4,7 7:2,5,17 8:4,9,15,21,23 9:11,25 10:8 11:3,18 12:9,12	12:15,20 13:9 13:12,24 14:16 15:3,10,11,12 15:23,25 16:1,3 16:7,9,12,16 16:20 17:3,12 17:15,17 18:9 18:11,22 19:5 19:11,14,19 20:2,9,11,12 20:18 21:5,10 21:25 22:8,11 22:19 23:8,12 23:16 24:2,7,13 25:7,13,16,20 25:21 26:4,11 26:17,19,23,23 26:24 27:6,10 27:20,21 28:12 29:3,9,16,18 29:25 30:8,11 30:25 31:1,7,22 31:24,25 33:7 33:23 34:2,5,20 34:21 35:9 36:1 36:9 37:1,3,24 38:7,8,13,16 39:1,5,13,16 40:7,10,12,14 40:17,18,19 41:14 42:12,16 42:17,21 43:6 43:10,14,15,25 44:7,10,12,21 45:10,23 46:2 46:10,11,20 47:12,15 48:1,4 48:14,21,22,22 49:9,16,17,20 50:11 51:4,12 52:9,14,18,23 53:3,13,19,25 54:3,18 55:2,9	KAGAN 14:16 15:3,10,23 27:20 30:25 31:24 33:23 34:2,5,20 49:16 50:11 keep 42:23 43:4 KENNEDY 21:25 33:7 KENNETH 1:6 kind 15:4,14 19:18 25:1 36:6 kinds 28:5 knew 4:6 know 9:5 22:6 30:21 33:5,7 34:7 35:7 36:14 36:19 38:8 49:17 50:20 51:14,24 54:5 knowledge 53:9 known 49:23 knows 35:1 51:10	<hr/> L <hr/> language 47:8 late 33:17 48:7 49:25 50:1 law 5:20 7:10 21:17,23 38:6 40:1 lawyer 24:11 43:18,20,21 45:13 lawyers 34:24,25 lead 32:12 leads 24:14 leave 37:10,13 41:3,25 47:1 leg 45:17 legal 29:6 legitimate 18:7 lengthy 40:16 lesser 26:12	letter 3:18 30:19 32:6,10 33:12 33:13 35:8,8,11 40:5 letters 28:5 32:12 let's 7:23 46:3 level 13:22 19:25 23:21 light 32:16 48:1 limitation 17:6,7 limited 12:16 35:17 47:9 Linda 54:9 line 16:25 link 52:6 linking 50:22 literally 20:18 litigated 3:11 13:20 litigation 5:25 6:8,10 14:12 22:20 25:1,1 little 46:17 lived 51:7 located 35:13 long 17:20 32:8 32:22 43:19 longer 15:21 31:14 long-litigated 44:6 look 20:3,24 26:18 28:16 37:11 40:23 45:12 46:2,24 48:3 54:17 looked 41:21 looking 9:17 18:1 lose 36:10 lot 18:14
		<hr/> K <hr/>		<hr/> M <hr/> made-up 16:10 magistrate 47:14	

magistrate's 47:1	mention 29:4	necessarily 24:21	O 2:1 3:1	oversaw 3:14
mail 35:17	merged 6:14	necessary 10:15	oath 29:19	<hr/> P <hr/>
maintained 30:21	merits 48:17 52:8	13:23	obligation 28:1,4 32:15,20 34:15	P 1:18 2:6 3:1 27:8
making 8:5 27:13 43:1 50:15	met 5:19 15:19	need 10:25 13:21 33:3 47:7	47:6	page 2:2 47:10 47:11,13
malo 48:17	MICHAEL 1:3	neighborhood 51:19	obligations 45:25	part 11:1 34:6 43:24 47:20
man 43:4	million 48:20	never 10:5,8 11:25 17:10	obviously 33:21 43:20	participate 12:13
mandamus 37:18	mind 29:14 35:4	39:2	occur 15:17	particular 18:5 21:15 24:1 25:5
mandatory 46:21	mine 28:7	new 5:13 6:15,16 18:7,8 28:13,15	occurred 7:12,22 11:14	27:24,25 34:24 49:10,11
manifest 47:23	minimal 29:15	31:16,17,17,18	occurring 14:12	particularly 13:1 50:21,24
March 28:9 34:17,18	minimum 9:14 49:14	35:11 36:6,15	occurs 13:22	pause 53:21,24 54:2
Martel 1:3 3:4	minute 28:6 50:25	36:17 37:12	office 3:20 53:14 53:17	peculiar 51:20
match 49:22 53:4	minutes 52:10	38:3,19 39:1,2	offices 43:17	penalty 3:14 43:5
matched 51:25 53:20	mistake 18:16	39:14 41:10,12	oh 13:9 22:2 27:1 33:15	pending 28:21 32:7,22 37:8 41:17,18
matching 7:21,25 8:2	Mister 38:7	43:20,21,22	okay 8:8 18:20 36:10	people 22:4 35:22 51:6,7,9
material 35:4 42:8 45:8	months 4:2 14:19 14:21	44:13,18,18	old 44:14,16 45:18	percipient 34:13 42:8 49:12
materiality 41:6	moon 41:10,12	45:5,17	omitted 46:17	period 32:22
materials 35:16	morning 3:4	newly 34:10 41:20	Once 5:2 6:10 26:20	permit 47:25
matter 1:11 18:17 21:17,23	motion 6:14,18 6:20,21 8:12	night 35:23 51:19	ones 28:18	permitted 33:21
24:24 26:21	14:6 17:8,8	Ninth 6:19,24 8:19,22 11:8	open-ended 48:23	perpetrator 8:2 51:22,23 52:25
29:6 55:12	19:8 21:14,21	14:1 19:7,23	operates 22:1	perpetrator's 51:25
matters 9:3 32:11 44:6	26:21 35:5	21:3,19,23 36:1	operating 36:13	person 34:3 44:13
mean 10:1 14:23 18:12,23 20:18	37:19,20 38:3	37:9,17,25	opinion 11:8 19:7 19:23 21:3,20	personal 29:7,19
21:18 22:1	38:23 39:17,19	38:17 39:22,23	22:2 33:9,14	petition 3:11,13 5:10,12 6:10,22
30:16 34:1 39:7	39:25 45:22 47:25	41:15 42:10	35:2	6:23,24,25 7:14
41:9 43:16	motions 48:11	noncapital 17:4 17:10,14 26:5,8	opposition 7:14 48:8 53:11	12:8 23:24
45:23 47:4,5	move 22:13	normal 25:18 38:20	oral 1:11 2:2,5 3:6 27:8	27:17 28:22
48:3 49:5 50:25	multiple 13:20 13:20 41:16	normally 20:25 24:17,20 25:2	Orange 5:19 7:10	31:21 32:7,21
51:12	murder 7:22,23 8:1,1,3,3 35:23	notice 6:11,11,13 27:22	order 4:4 5:5,10 39:24	36:5,19,23 37:5
meaning 18:9,12 21:8 39:1	51:18 53:1,10	notion 50:12	ordered 4:25 6:19	41:3 47:10
meaningful 20:22	54:8,12	notoriously 43:17	outcome 7:18,19	
means 8:14 17:12	murderer 52:25	numerous 54:7,8		
meet 15:18	murders 54:16	<hr/> O <hr/>		
	mutual 55:8			
	<hr/> N <hr/>			
	N 2:1,1 3:1			

<p>54:15 petitioner 1:4,17 2:4,10 3:7 10:12 13:14 15:6 52:13 petitioners 26:8 phase 43:5 phrase 21:4 physical 5:17,25 10:18,21 11:5,9 30:22 32:13 35:11 36:7,20 38:3 42:1 45:1 50:22 51:1,2 pivotal 14:24 place 31:13 plan 27:24 please 3:9 27:11 34:16 37:13 45:4 46:3 plenty 12:6 point 3:25 4:9 9:8 12:7,24 13:18 14:9,11,13 15:21 16:12,16 24:12 26:24 29:5 31:2,3 32:7,9 35:10 44:24 49:7 51:6 55:5 police 49:13 posited 25:23 positing 15:25 position 3:22 9:6 12:17 22:6 40:3 43:22 44:13 possible 11:3 post 12:19 post-evidentiary 4:18 potential 13:3 34:11 35:24 power 9:12,13 18:14 19:17 practical 24:24</p>	<p>36:3 practice 25:11 prejudice 11:15 41:6 premise 19:7,23 premises 9:24 prepared 35:20 present 27:25 45:5 50:2 51:6 presentation 8:10 presented 9:17 11:2 34:8 presided 3:15 presumably 32:8 presume 8:13 presuming 13:10 13:12 presumptions 44:5 pretty 31:25 50:23 previous 46:14 previously 29:17 35:14 45:2 prints 35:20 53:4 53:4 Prior 30:17 probably 4:12 18:18 probative 35:17 problem 14:12 24:8 32:3 problems 53:15 proceed 5:1 proceeding 11:24 proceedings 12:13,21 47:16 48:7 process 9:1 10:17 12:8 13:1 13:2,6 45:17 processes 33:5,8 professional</p>	<p>45:24 progeny 47:5 promptly 26:22 proper 5:6 32:23 proposing 8:15 proposition 30:17 31:12 prosecute 23:3 prosecuted 10:20 prosecutor's 53:14,16 protect 18:4 protecting 26:2 protective 6:22 proven 37:21 provide 12:4 provided 22:17 49:23,24 provision 46:14 public 3:20,23 5:19,22 6:12 9:22 13:25 14:4 42:9 43:16 48:10,13 puncture 51:20 purposes 26:16 pursue 25:10 34:9 pursuing 42:6 46:6 put 40:2 43:21 putting 48:15</p> <hr/> <p>Q</p> <p>qualifications 15:19 23:6 qualified 15:9 23:10 question 17:21 28:25 34:21 35:10 36:5 38:11,12 40:12 40:14 49:7 questions 14:17</p>	<p>27:5 54:23 quite 32:16</p> <hr/> <p>R</p> <p>R 3:1 raise 12:7 22:22 28:15,15,18 raised 3:13 13:19 rare 48:12 rarest 48:24 reached 13:18 15:21 reaction 46:21 read 8:4,21 reading 32:2 33:2 47:10 ready 35:2 real 49:7 realize 48:5 really 8:7 10:5 11:25 18:10,16 18:17,25 19:20 20:2,41:21 48:14,21 49:6 50:23 54:24 55:1 reason 9:16,23 15:18 18:7 38:18 42:6 43:8 reasons 9:15 12:6 REBUTTAL 2:8 52:12 recall 32:3 received 3:15 9:18 15:1 receives 30:19 record 9:17 10:11,12 20:3 20:24 41:22 recorded 32:18 50:2 referring 7:2 reflect 18:23 refusing 42:10</p>	<p>45:3 regarded 50:7 regarding 5:22 5:25 16:24 53:12 regardless 8:10 regards 7:11 reinforcement 55:8 reiterate 47:7 reject 35:5 related 33:11 35:12 relations 34:23 36:15 relationship 7:11 7:12 14:2 relevance 31:3 reluctant 20:22 relying 14:17 remaining 52:11 remains 25:5 remand 13:14 31:16 38:20 45:20 remedies 25:10 remedy 9:13 30:4,5 31:5,8 38:14 remember 37:4 remind 7:18 reopen 45:14 reopening 37:14 44:6,15,17 replaced 3:21 report 5:13 51:21 represent 33:1 36:14 representation 14:14 15:8 26:16 32:4 represented 18:3 35:11,14 40:4 45:2,8 representing</p>
---	---	--	---	---

15:22 23:4 25:4 43:18 request 5:5 6:2 6:17 9:19 33:16 33:21 49:2 requested 3:20 47:25 requests 28:5 required 15:4 27:19 32:1 34:5 43:10 requirement 46:22 requires 12:12 48:21 49:14 resolve 41:16 resources 43:16 respect 44:17 45:15 49:10 respond 34:16 responded 3:23 Respondent 1:19 2:7 27:9 response 34:19 34:22 responses 23:20 responsibility 46:9 rest 47:19 restrictions 44:21 retire 29:10,13 29:13 retired 30:2 retiring 4:11 29:1 29:21 30:1 31:4 revealed 11:6 review 8:11 21:11 right 8:21 16:6 16:24 17:5 18:4 18:5,6 19:11,20 20:14,15 22:20 23:9 25:23,24 26:2,9 33:25	34:1 36:7,16 38:4 46:12 55:3 rightly 14:6 rights 26:12,15 37:9 ROBERTS 3:3 4:5 21:10 27:6 27:21 28:12 29:3,9,16,18 29:25 30:8,11 31:1,7,22 40:7 40:10,17 43:14 44:7,12,21 45:10 52:9 55:9 Rodgers 7:23 8:1 8:3 53:1,9 54:9 routinely 26:18 rule 6:16,17,18 6:20,21 28:11 31:21 36:24 37:10,10,18 41:18,25 42:2 45:21 47:20 run 28:7 51:15 runs 49:20 <hr/> S <hr/> S 2:1 3:1 Sacramento 1:16 salient 50:24 sat 37:9 satisfied 43:11 saw 32:10 saying 9:2,12 20:5 26:11 29:16,18 33:25 36:13 44:25 says 11:8 22:23 23:17 25:10 28:12 30:20 34:21 41:10 43:20 47:11,12 48:13 Scalia 20:9,12 25:7,13,16	46:10,20 48:4 54:18 scenarios 50:21 scene 8:1 35:14 49:22 53:1,20 scope 19:18 38:14 search 20:20 second 5:3 25:3 30:20 section 21:5 22:18 see 7:21,23 20:24 32:10 36:2,2,3 38:5 46:5 seek 27:19 seeking 5:22 37:22 seemingly 46:17 sees 18:17 send 31:10 sent 3:18 5:3 32:6 sentence 22:22 42:25 47:13,22 52:4 separate 24:25 serious 17:5 serve 48:9 set 4:15,18 7:13 9:14 19:17 49:11 Seth 1:18 2:6 23:8 27:8 shot 42:23 43:4 show 11:15 37:23 51:15 showing 42:3 51:6 sides 3:21 significance 29:10,11,13 similar 17:24 similarity 51:18	simply 10:22 14:10 18:1 25:11 28:8 30:17 31:18 34:15 37:8 site 8:3 sitting 23:9 situation 24:24 24:25 27:15 28:21 43:18 45:12 49:10 situations 13:13 25:22 six 29:4 30:1 Sixth 16:24 17:21,25 skepticism 33:22 slim 43:2 somebody 45:4 48:15 soon 40:4 sorry 6:6,7 7:17 10:7-30:20 31:2 40:9 42:16 47:11 49:19 52:18 53:3,25 sort 16:9 Sotomayor 7:17 8:4,9,21 9:25 10:8 12:9,12,15 13:9,12 15:11 16:9,12,16 17:3 17:15 22:19 23:8,12,16 24:2 24:7,13 25:20 26:4,11,17,23 38:7,13,16 39:1 39:5,13,16 40:18 52:14,18 52:23 53:3,13 53:19,25 54:3 specific 27:14 28:23 35:12 42:7 specifically	34:12 speed 43:22 stage 33:17 47:16 48:7 standard 8:11,14 8:16,18,23 9:11 13:2 15:13,25 16:1,3,8,10,13 17:15 18:9,19 19:18,24 20:21 21:11,15 22:3 22:11,16 25:21 25:24 26:1,19 26:21,25 27:2 43:11,25 45:23 46:11 47:12 48:3 49:3,6,8 standards 22:5 44:14 standpoint 10:19 53:16 started 21:4 State 12:4,25,25 13:1,2,7,8,22 34:15 39:8 42:9 46:10 48:2,17 51:16,23,25 stated 4:1 statement 50:5,7 50:24 54:21 statements 32:17 50:2 54:8 54:21 States 1:1,12 47:14 State's 30:23 41:20 45:2 48:8 50:23 51:2,21 54:20,21 station 49:13 status 6:9 46:3 statute 15:9 17:6 47:11 statutory 16:6 17:13 18:3 26:2
--	--	---	--	--

stayed 29:23	30:6 38:23 39:9	tape 32:18 55:1,6	13:13 14:19,24	truly 24:11
steps 38:21	39:25 40:6	55:6	16:2,4 17:19	truth 36:12
stopped 39:3	41:19 47:21,25	taped 54:9	18:12,13,23	try 36:4 54:24
straightforward	48:8 49:2	Taylor 32:2 41:7	19:15 20:17,22	trying 20:7,19
42:4	substitutions	46:2 48:3	20:25 21:2,8,11	31:1,2 36:2,10
strange 46:17,20	28:6	team 3:19	23:22 25:25	38:1,2 40:10
strategic 9:21	successive 6:23	technically 39:11	26:8,13 28:3,13	54:23
43:3 45:13	succinctly 7:24	techniques 11:13	30:13 32:20	Tuesday 1:9
strikes 30:12	sufficient 10:13	tell 6:4,7 9:10	33:15 34:7 36:2	turned 5:14
strong 33:22	suggesting 17:4	20:22 22:4	37:3 42:10 44:2	28:13
struggling 41:15	26:4 33:23	24:13,23 36:12	45:11,19 46:19	two 8:5 28:9
subject 11:10	superintended	52:14	47:23 48:13,13	type 12:4,5,15
submission 3:17	31:14	term 25:18	49:8,17 50:19	13:21 23:24
4:22 14:10	superseding	terms 21:21	50:20 52:19	35:23
submissions 4:16	38:11	26:15	53:15,23 54:1,1	types 24:18
4:25	Supervising 1:15	terrible 34:23	54:17,18 55:5	
submit 27:2	support 11:14	test 15:24 16:17	thinking 19:20	U
submitted 55:10	37:14 48:14	23:19 37:13	38:9	Uh-huh 38:15
55:12	supported 10:23	43:10 48:23,23	third 23:5	undercut 53:18
submitting 17:23	34:8	53:7 54:3	thought 9:8	understaffed
subsection 47:19	suppose 13:24	tested 11:5 32:14	15:23 31:20	43:17
subsequent	13:24 14:4	35:21 51:14	33:5,8 41:21	understand 4:10
12:13	21:10,12 34:21	testified 55:6	42:17,21	14:16 39:23
subsequently	36:10,11,11	testimony 54:11	three 16:2 48:16	40:22 46:5
4:21 36:15	51:4	55:7	52:10	understandable
substance 22:10	supposed 20:6	testing 5:22,23	time 4:20 6:1	48:9
22:11	Supreme 1:1,12	5:23 7:6,9,18	7:10,13 9:18	understood
Substances	7:1 27:23 54:13	7:20,20 11:10	11:2,6,22 13:5	40:11 41:17
46:24	sure 4:9 39:21	11:16 35:12	13:18 28:6	undoubtedly
substitute 8:13	suspect 18:12	52:15,17,21,21	30:20 32:5,8,14	23:10
12:22 17:8	23:12	52:22 53:10,10	32:22 39:6	unexhausted
22:24 23:18	suspected 35:22	54:5,6	43:19 49:20	12:3
27:16,18 31:12	suspects 35:24	tests 48:16	timely 39:17	United 1:1,12
33:16 37:21		thank 27:6 40:14	times 13:20 29:4	47:13
39:19 40:23,25	T	40:20 52:9 55:9	30:1	unjustified 30:14
45:20,21 47:15	T 2:1,1	theory 22:25	told 28:14 48:2	unknown 51:9
substituted 25:3	tactical 9:21	thing 23:25 34:24	55:3	unsuccessful 6:1
32:19,21 39:10	22:14 24:19	34:25 37:6	total 13:3	untrue 35:18
45:15,16	45:13	38:20	trial 11:6,13,14	unusable 35:16
substitution 6:2	take 4:1 11:8	things 35:18	12:25 13:1,7,22	upset 5:21
6:14 10:14 13:3	38:22 43:20	39:19 44:9,15	28:23 32:14	use 18:21 20:4
14:3,7 17:12	taken 5:21 39:10	45:11	35:15 46:25	20:13,19,21
19:8 21:22	takes 33:18	think 4:8 7:13 8:5	50:6 51:5	26:22
22:12,13 25:22	talked 44:22	8:18,18 10:1,3	trigger 21:22	usually 25:3
26:21 27:13	talking 25:1,8	10:4 11:7,21	true 46:6 47:22	U.S 35:16

U.S.C 31:16	27:10 28:3,20	wonder 43:24	1987 11:11,13,15	9
V	29:8,11,17,22	words 18:21,22	11:16	93 47:11
v 1:5 3:4	30:3,10,15,25	20:4,10,13,13	2	93A 47:13
vacuum 22:2	31:5,9,24 33:4	20:19,21 37:25	2 14:19,21	95 47:10
51:13	33:8,15,24 34:1	41:5 44:15,18	2-day 3:15	
value 35:17	34:4,7 35:6	50:13	2005 4:12,14,22	
45:20	36:8,22 37:2,7	work 5:10 43:21	5:3 9:19	
various 44:19	38:10,15,25	worked 38:1	2011 1:9	
victim 52:2	39:4,7,15,21	world 15:12	2106 31:16	
view 37:25	40:8,13,20	worry 53:13	27 2:7	
viewed 34:14	42:13,14,17,20	wouldn't 10:22	27th 29:1	
vindicate 18:5	43:6 44:2,9,20	11:21 12:2	28 31:16	
violated 29:19	44:23 45:19	18:12 23:14	29th 32:3	
violations 28:24	46:10,19 49:5	25:23 37:8 52:2	3	
volunteer 24:23	49:19 50:3,19	53:21	3 2:4 4:2 46:3	
24:24 25:7,9,12	51:12	wrecks 18:16	30 47:8	
25:14,15,16	way 4:5,9 10:19	writ 6:23,25	30th 4:11 29:1	
Volunteering	14:14 16:18,23	write 46:3	32:5	
25:16	19:12 21:20	writing 30:20	3006 46:23 47:18	
W	28:24 32:11	written 4:4 5:4	3006A(c) 46:15	
wait 50:25	35:1 38:1,5	wrong 8:13,14,15	46:16 47:8,9	
want 8:6 11:17	41:15 42:4 48:4	21:17,23	35 47:24	
19:18,25 20:2,4	49:6 52:6	X	3599 12:21 13:13	
20:7,9,10,12	weak 50:13 51:8	x 1:2,7	15:8 22:18	
20:20 22:10,23	week 27:21	Y	46:13,16,21	
23:2 25:10,11	well-articulated	years 3:10,14	47:7	
27:25 28:4,15	44:4	16:23 29:24	3599(e) 12:10	
29:3 34:25 36:3	went 10:18 18:19	31:13,14 40:24	47:24	
42:24,25 43:20	46:5	42:19	39 3:13	
46:15 47:1	weren't 51:7	1	4	
wanted 48:19	We'll 3:3	10 29:24 51:6	47 33:10	
wants 22:21 23:3	we're 15:11 17:9	10-1265 1:5 3:4	5	
34:23 38:21	40:24 41:24	10:03 1:13 3:2	5 31:13 40:23	
WARD 1:15 2:3	46:25 49:5 50:9	11:03 55:11	52 2:10	
2:9 3:6 52:12	whatsoever 28:4	12 3:10 31:14	6	
WARDEN 1:3	willing 3:24	42:18	6 1:9	
Washington 1:8	34:13 42:7	14 33:8	60 33:9 37:10	
1:18	49:12	15 45:21	60(b) 6:18,20,21	
wasn't 4:16	win 13:10,13	15(a)(2) 31:21	36:24 37:5,11	
11:16 14:4	wins 13:14	16 33:14	41:18,25 42:2	
39:14	wired 50:5	16th 5:2 32:5	61-page 33:9,14	
Waxman 1:18	witness 34:13	33:12		
2:6 23:9 27:7,8	42:8 49:12			
	witnesses 31:19			
	woman 51:18			